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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x
3 UNITED STATES OF AMERICA,

4 v.

15 Cr. 536 (PGG)

5 KALEIL ISAZA TUZMAN, et al.,

6 Defendants.

Trial

7 -----x

New York, N.Y.
8 December 20, 2017
9 9:40 a.m.

Before:

10 HON. PAUL G. GARDEPHE,

11 District Judge
12 -and a jury-

APPEARANCES

13 JOON H. KIM

Acting United States Attorney for
14 the Southern District of New York

A. DAMIAN WILLIAMS

15 ANDREA M. GRISWOLD

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16 Assistant United States Attorneys

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20 RANDALL W. JACKSON
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1 (In open court, jury not present)

2 THE COURT: So at some point in the early morning
3 hours I got another letter -- obviously I didn't get the
4 letter, I wasn't here when the letter arrived, but Mr. Jackson
5 did you send something in the early morning about this issue
6 about Government Exhibit 610.

7 MR. JACKSON: Yes.

8 THE COURT: What time?

9 MR. JACKSON: 3:00 a.m. I didn't get the government's
10 letter until after 6:00 p.m. and I was preparing for today's
11 testimony, so I wasn't able to get to it. I tried to complete
12 it, but I wasn't able to, your Honor. I'm sorry.

13 THE COURT: So there's a number of things in
14 Mr. Jackson's letter. One of the points he makes is that he's
15 not going to stipulate as to the wires that are set forth in
16 Government Exhibit 610. Just for the record, the letter is
17 docket number 624, footnote 6, Mr. Jackson says he's not going
18 to stipulate as to the wire transfers set forth in Government
19 Exhibit 610.

20 So how does the government intend to deal with that
21 issue?

22 MR. WILLIAMS: Your Honor, we have attempted to reach
23 out to Bank of America and see if they could have a witness
24 available to be able to authenticate the document and explain
25 what it is.

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1 THE COURT: All right. And have you heard anything
2 back? The proof is going close today.

3 MR. WILLIAMS: We understand, your Honor. We
4 understand the urgency.

5 THE COURT: Now is it true that you marked this
6 exhibit prior to trial?

7 MR. WILLIAMS: Yes, your Honor, it is.

8 THE COURT: Given it was marked as a trial exhibit,
9 why didn't you introduce it in your direct case?

10 MR. WILLIAMS: Your Honor, we have been going over
11 that exact question among the team. It appears to have been
12 something that we didn't think was necessary, and there is
13 sufficient evidence in the record otherwise of wires and the
14 location of the wires back and forth. Government Exhibit 610
15 simplifies the matter by putting everything on one page.
16 Obviously it would have been better if we had introduced that
17 one exhibit.

18 THE COURT: Are you saying that some of the wire
19 transfers you rely on in Government Exhibit 610 are in the
20 record anyway?

21 MR. WILLIAMS: Yes, but they're in a multitude of
22 documents. We would have to walk through document by document
23 and weave it all together. We could do that with evidence
24 already in the record showing wires from Enable to Maiden
25 Capital, between San Francisco and North Carolina, wires from

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1 Maiden Capital into Manhattan, but it's a laborious exercise,
2 whereas 610 puts it on one piece of paper.

3 THE COURT: There is some support for the argument
4 that I have discretion to permit the government to reopen, but
5 it's a difficult situation where the government doesn't really
6 have any kind of justification for not having introduced this
7 in its case.

8 Now in *Leslie*, 103. F.3d 1093, the court says in that
9 case in the context of the interstate commerce element, it says
10 that the interstate commerce element, like venue, is a simple
11 matter, and "the district court may allow the government to
12 reopen its case to establish this jurisdictional predicate."

13 Now Mr. Jackson says well, this is a little more
14 complicated than interstate -- just proving interstate
15 commerce, it's a little more complicated than just proving
16 venue because the government has to demonstrate that the wires
17 were sent in furtherance of the conspiracy, so it's a more
18 complicated exercise. So while *Leslie* provides some authority
19 for the notion that I have discretion to reopen for purposes of
20 venue or for purposes of satisfying the interstate commerce
21 element, the argument that Mr. Jackson made, that what's at
22 issue here is a little more complicated, I believe has some
23 force to it.

24 What do you say?

25 MR. WILLIAMS: Your Honor, we certainly think that the

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1 cases that we cited make clear that proof of interstate
2 commerce is similar to proof of interstate wire. After all,
3 the mens rea element isn't applicable to the interstate wire
4 aspect of wire fraud, so we think that they're actually quite
5 similar, and we cited a couple of cases to that point in our
6 letter.

7 THE COURT: What did you cite for that point?

8 MR. WILLIAMS: *United States v. Price*, 347 Fed App'x.
9 189, 191 (2d Cir. 2010), page 4 of our letter, your Honor, and
10 also *United States v. Blackman*, which is 839 F.2d 900, 907 (2d
11 Cir. 1988). We certainly believe that interstate commerce is
12 of apiece with interstate wire, and they're plainly
13 jurisdictional, the circuit made that clear, and we think the
14 Court has discretion, broad discretion to permit the government
15 to reopen its case for that point. And we're happy to make the
16 record clear that we believe we have sufficient evidence in the
17 record absent 610, but that --

18 THE COURT: That's kind of a problem, too, you make a
19 representation, I think you said there are hundreds of text
20 messages and emails that you believe satisfy, but you haven't
21 been able to cite -- you haven't been able to give me exhibit
22 numbers that I can go to and immediately say okay, this was in
23 furtherance of the charged conspiracy. I don't understand why
24 that's been difficult. If in fact there are hundreds of
25 exhibits that, according to you, satisfy this requirement, why

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1 has it been so hard to tell me -- give me some subset of the
2 hundreds of exhibits so that we can just put that matter to
3 bed? Why has that been so difficult?

4 MR. WILLIAMS: Your Honor, it's not difficult. We
5 identified two documents, one is a text message between Maiden
6 and Amanat and the other was an email communication, which we
7 thought on their face were clearly in furtherance of the
8 conspiracy, and we tied that together with Government
9 Exhibit 2970 which identified Mr. Amanat residing in Manhattan
10 as of December 31, 2008.

11 We thought that was sufficient as an exemplar, but if
12 the Court would like further examples, we're happy to provide
13 as well some of the financial transactions between Maiden and
14 Omar Amanat to show interstate wires, and then of course
15 additional wires from Maiden into New York. So we think we
16 have enough, your Honor, and again, we're happy to supplement
17 the record.

18 We got Mr. Jackson's letter at 3:00 in the morning
19 like the Court did, or rather when we woke up this morning. So
20 we see he's not willing to stipulate to the authenticity of the
21 document, we called Bank of America once we saw that footnote,
22 and we're happy to provide any further guidance the Court would
23 like.

24 THE COURT: We're running out of time. I read the
25 primary cases you relied on, they do stand for the proposition

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1 that I have discretion with respect to technical matters or
2 what the court refers to as simple matters, such as
3 satisfaction of the interstate commerce element and venue.

4 As I said, I believe that Mr. Jackson's argument that
5 the "in furtherance" requirement makes this slightly more
6 complicated has some force to it. And given that, there really
7 has been no explanation why Government Exhibit 610, which was
8 marked prior to trial, wasn't introduced. I'm going to sustain
9 the objection. I'm not going to allow the exhibit to be put in
10 on the government's rebuttal case.

11 MR. WILLIAMS: Thank you, your Honor. We'll certainly
12 argue it to the jury. We'll take the time to button it up and
13 they'll make the decision.

14 THE COURT: All right. As you know, we're coming up
15 on December 21st. It is my intention to have Mr. Ruocco to
16 communicate to juror number four that we will permit her to
17 depart at 2:00 p.m. on December 21. Because it is clear to me
18 at that we will not have summations completed by 2 o'clock on
19 December 21, so it is not an option to bring the juror back. I
20 can't do that. So given where we are in terms of the trial, it
21 is my intention -- because she's probably worried about this,
22 it is my intention to have Mr. Ruocco communicate to her we
23 will not hold her past 2 o'clock on December 21.

24 Does anyone disagree?

25 MR. JACKSON: No, your Honor.

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1 MR. WEITZMAN: No, your Honor.

2 MS. GRISWOLD: No, your Honor.

3 THE COURT: I sent you last night in chunks the first
4 60 pages of the charge. I just wanted to get it to you, get
5 most of it to you. I am still making changes to it. I was a
6 little bit on the fence about how to treat venue. I initially
7 thought I just may address the venue at the end and say it
8 applies to all six counts. I became uncomfortable with that
9 approach as I worked on the document, and so now I have a
10 reference to venue in each count. So each count will say,
11 after it goes through the elements, that the government also
12 must meet its burden with respect to venue. So that's a change
13 from what I sent you. We are continuing to work on the last
14 few pages of the document, but I expect this will be completed
15 this afternoon, and my expectation is we will have a charge
16 conference this afternoon.

17 Anything anyone wants to say about the charge?

18 MR. WEITZMAN: Yeah, your Honor, we're still working
19 our way through the charge. The one thing I did notice is with
20 respect Count Four, your Honor provided the I think traditional
21 and well-accepted securities fraud count. Count Four is a
22 market manipulation theory, as your Honor is aware. We
23 attempted as best as possible in our request to charge at pages
24 63 through 65 to define market manipulation.

25 It's a very tricky subject, your Honor, where a

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1 witness, Mr. Maiden, has acknowledged that he was interested in
2 the stock, he was a bone fide purchaser of the stock before any
3 12/31/08 agreement. So the issue of artificial inflation is a
4 very complex issue because, frankly, I don't know how the jury
5 parses between what he genuinely desired to do and what he was
6 doing in an effort to artificially inflate.

7 But they need some guidance, I think, from your Honor
8 as to what market manipulation is, what the differences between
9 real market activity and market manipulation. And the example
10 I want to give your Honor is if the CEO gets on Fox News and
11 says hey, everybody buy my stock, and I think my company is
12 great, and they all buy the stock and it inflates the volume
13 and the price of the stock, that's not market manipulation. So
14 they need some guideposts here, and I think the traditional
15 securities fraud instruction is insufficient because what it
16 really talks about is whether material information was omitted
17 or provided, and that's not really it in this context.

18 MR. WILLIAMS: Your Honor, we're happy to look at
19 other recent market manipulation cases, but it strikes us as
20 odd for the Court to be instructing the jury as to what market
21 manipulation looks like. The example Mr. Weitzman gave
22 certainly wouldn't count. We think that the traditional
23 securities fraud instruction wouldn't allow the jury to convict
24 the CEO who makes a public statement that my company is great,
25 please buy my stock. So we'll go back and look specifically at

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1 *United States v. Durante*, which is this office's last market
2 manipulation trial from March of 2017, your Honor.

3 THE COURT: How do you spell Durante?

4 MR. WILLIAMS: D-U-R-A-N-T-E, 15 CR 171. It was Judge
5 Carter.

6 THE COURT: Okay.

7 MR. WEITZMAN: And your Honor, the instruction we
8 proposed is not -- does not provide a hypothetical such as the
9 one that I provided.

10 THE COURT: I know that.

11 MR. WEITZMAN: It's really an effort to provide a
12 legal definition to market manipulation and artificial
13 inflation.

14 THE COURT: I understand.

15 Let me talk to my law clerk for a second.

16 (Pause)

17 MR. NAFTALIS: Your Honor, we're still working our way
18 through the substantive instructions, but with respect to the
19 statutes of limitations instruction, we sent a letter last
20 night at your Honor's request.

21 THE COURT: He have your date in there, don't I?

22 MR. NAFTALIS: You do have our date, but I think the
23 issue -- the instruction is confusing because it implies that
24 the jury has to find that each, meaning each --

25 THE COURT: I'm sorry?

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1 MR. NAFTALIS: The sort of the new second element
2 within the statute of limitations instruction indicates that
3 the jury has to find that each Mr. Tuzman and Mr. Amanat have
4 to continue to participate, and we don't think that's accurate,
5 we think that --

6 THE COURT: You think it's enough if there's an overt
7 act within the period, right?

8 MR. NAFTALIS: Exactly.

9 THE COURT: That's probably right. I will take
10 another look at that.

11 MR. WEITZMAN: And your Honor, on that issue, I think
12 that the case law that the government cites in its letter, in
13 particular *United States v. Martinez*, (2d Cir. 2017) they cite
14 on page 4 specifically says the limitations period begins only
15 when the purposes of the conspiracy have been accomplished or
16 abandoned.

17 Our point, your Honor, is that even according to
18 Mr. Maiden's testimony, the purposes of the alleged conspiracy
19 were accomplished upon the uplisting to NASDAQ. So there needs
20 to be some instruction that the conspiracy ends when its object
21 is accomplished, and we'll argue, I take it, what that object
22 was. I think Mr. Maiden's testimony provides that object. And
23 so if he continues to manipulate, as he does in his general
24 practice, or attempts to after the object is accomplished, the
25 conspiracy is over, he's just acting on his own.

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1 MR. NAFTALIS: Your Honor, we just don't think that's
2 accurate.

3 MR. WEITZMAN: It's their case.

4 MR. NAFTALIS: We pulled our instruction right from
5 Sand, and it's an affirmative defense that a member of the
6 conspiracy withdraws, but we don't have to prove it keeps
7 going. And this may be their spin that the object ended, but
8 that is not the crime charged. So they're welcome to argue to
9 the jury Maiden was freelancing, but there's just no evidence
10 of that, and it shouldn't be in the instruction. It's the
11 charge that the conspiracy continued into 2012, and all we need
12 to prove is that one member of the conspiracy committed an
13 overt act.

14 THE COURT: Well, he says that the object of the
15 conspiracy was accomplished, and there is law to the effect
16 that once the object of the conspiracy is accomplished, the
17 conspiracy is over. There is law that supports is that notion.

18 MR. NAFTALIS: It's his theory that the object was
19 just to get -- but that's not what Mr. Maiden testified to.

20 THE COURT: But the question is whether he's entitled
21 to language that says that -- and it may already be in there, I
22 just don't remember off the top of my head, the question is
23 whether he's entitled to language that says once the -- I think
24 the language is already in there, but you don't disagree that
25 he's entitled to language that says once the object of the

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1 conspiracy has been accomplished, the conspiracy is over, you
2 don't object to that, do you?

3 MR. NAFTALIS: That is correct, but the issue is
4 inserting it into the statute of limitations period and
5 creating -- he basically wants to argue the statute period when
6 this is an uncontroversial point. He will obviously argue it
7 to the jury. But the object is to manipulate the stock, not to
8 manipulate the stock to get it on the NASDAQ, and we don't
9 think it should be in the instruction.

10 THE COURT: Mr. Weitzman, you believe that that
11 concept is not already in the charge? It is in the charge is
12 my recollection.

13 MR. WEITZMAN: I don't believe it is, your Honor.

14 THE COURT: You don't think it is in there at all?

15 MR. WEITZMAN: I don't think it is, your Honor.

16 THE COURT: I will go and look at it.

17 MR. WEITZMAN: The object of the conspiracy under the
18 law is market manipulation, that's the object of the conspiracy
19 technically, but the question is what is the purpose of the
20 conspiracy, and that's what the *Martinez* case on which the
21 government relies specifically says is when the limitations
22 period begins. When the purpose of the conspiracy has been
23 accomplished then the statute runs.

24 THE COURT: What do you rely on for that?

25 MR. WEITZMAN: The *United States v. Martinez* case,

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1 which is 862 F.3d 223, jump cite 232.

2 THE COURT: All right.

3 MR. NAFTALIS: Your Honor, the purpose is the object.
4 I don't know what Mr. Weitzman is trying to splice it into.
5 The purpose, as alleged, goes to 2012. The object is to
6 manipulate the stock. The fact that it moves up to NASDAQ is
7 not what Mr. Maiden says. This is what they want to argue, and
8 they are welcome to do it, but we don't think it's appropriate
9 to start adding language. It's an uncontroversial legal
10 principle that when the object is accomplished the conspiracy
11 ends, they're welcome to argue this, but I don't think there
12 should be additional instructions.

13 THE COURT: We can't spend more time on this. We'll
14 have to talk it about it more but I'll look at the case.

15 MR. JACKSON: I have a couple of quick logistical
16 issues, but I want to ask if Special Agent DeCapua could be
17 excused very briefly.

18 THE COURT: You can step out, sir.

19 MR. JACKSON: My first issue is with regard to -- I'm
20 just anticipating a little bit of the testimony this morning in
21 relationship to the hearing. For one, I don't know if the
22 government has AN intention to offer Special Agent DeCapua's
23 résumé, but I don't think it would be appropriate to offer
24 that.

25 MS. GRISWOLD: We were going to go into it as part of

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1 going into the background, similar as Mr. Weitzman did with
2 Professor Ferrell.

3 THE COURT: Now he's testifying as an expert.

4 MR. JACKSON: Yes, your Honor, and I'm happy for them
5 to go through his credentials that are on the résumé. My
6 concern is the résumé includes several internal FBI agent of
7 the year type awards that I think in that sense it's not like a
8 normal résumé, it confers upon the expert I think an improper
9 degree --

10 THE COURT: Could you hand up a copy of the résumé?

11 MR. NAFTALIS: Your Honor, just to be clear,
12 Mr. Weitzman went out of his way to make sure --

13 THE COURT: Could you hand up a copy of the résumé,
14 please?

15 (Pause)

16 THE COURT: So you're objecting to the lines that say
17 Exceptional Service Award, Federal Bureau of Investigation,
18 2017, and Investigator of the Year Award, Federal Law
19 Enforcement Foundation, 2016, that's what you're objecting to?

20 MR. JACKSON: That is all, your Honor.

21 THE COURT: I will overrule the objection. I don't
22 see it as problematic in any fashion.

23 MR. JACKSON: Okay, your Honor.

24 The second thing, your Honor, is I just wanted to say
25 I'm not exactly sure how the Court will deal with the

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1 qualifying of him as an expert, because I know that it seems
2 most of the judges in this district have a different way of
3 dealing with it. Some -- Judge Rakoff says you should just --
4 there shouldn't be any qualifying, that's for the jury to
5 determine.

6 THE COURT: My philosophy, you have already seen it in
7 action, the whole "I tender him as an expert," I don't do that,
8 I don't believe in that. I will allow the witness to offer an
9 opinion.

10 And by the way, in the charge I don't refer to expert
11 witnesses as expert witnesses because I think that's
12 prejudicial, and I refer to them as witnesses who are permitted
13 to offer an opinion. So that's what I did with Professor
14 Ferrell. I didn't announce to the jury Professor Ferrell is an
15 expert, I just said I will allow Professor Ferrell to offer
16 opinion testimony.

17 I will do the same thing with Agent DeCapua. I will
18 not make an announcement to the jury that Agent DeCapua is an
19 expert. If you wish, you're welcome to say: Your Honor, may
20 Agent DeCapua offer opinion testimony in this case? And I will
21 say: Yes, he may.

22 MS. GRISWOLD: That's perfect, your Honor.

23 MR. JACKSON: That's perfect for us, too, Judge,
24 especially if it's limited to opinion testimony because I think
25 we are just a little concerned that the scope of what his

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1 expertise is may be a little bit misconstrued, so if it's
2 offering an opinion -- the language the Court used, that's
3 perfect for us.

4 The last thing, Judge, is during Mr. Maiden's
5 testimony at the hearing when he was asked why he didn't notice
6 this, one of the statements that he made that I think
7 Ms. Griswold appropriately told him on the stand was improper
8 was he said something like I assume Mr. Jackson, law firm of
9 his caliber would be blah, blah, blah, I think any statement
10 like that would be deeply prejudicial.

11 THE COURT: You're not going to go down that road with
12 Mr. Maiden, are you, that Mr. Jackson is at a big law firm so I
13 assume that anything he shows me is kosher.

14 MS. GRISWOLD: Your Honor, Mr. Maiden would say -- we
15 would like to elicit that he expected that all documents being
16 shown to him by either party, it didn't cross his mind they
17 were not authentic. As we saw at the hearing, I said leave
18 Mr. Jackson out of this. In light of this conversation, I will
19 ask for an opportunity to speak to him briefly before he takes
20 the stand.

21 THE COURT: Yeah, there shouldn't be any reference to
22 Mr. Jackson or Mr. Jackson's law firm. I do think it's
23 permissible for him to say that he expected the documents that
24 would be shown to him by either side, he assumed that they were
25 real.

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1 MS. GRISWOLD: Okay.

2 MR. JACKSON: Thank you, Judge. Sorry, one last very
3 quick thing, I don't think that we have had this, but this was
4 a question posed during the hearing of one of the witnesses as
5 to -- I think as to Special Agent DeCapua as to whether or not
6 the witness was aware of whether the government had asked
7 Mr. Amanat if they could have full access to his accounts. We
8 think that's an improper question. It shifts the burden and
9 implies that Mr. Amanat had a responsibility to give the
10 government voluntarily full access to his accounts. We did
11 voluntarily provide the data that is the basis of their entire
12 application, so anything beyond at that I think is really
13 improper.

14 MS. GRISWOLD: Your Honor, I think we would intend to
15 elicit that he did not analyze metadata for the fourth -- he
16 didn't have metadata for the fourth email. I think that's
17 fine, so long as Mr. Jackson, if he calls an expert or gets
18 into certain things about what they reviewed, we would intend
19 to cross that expert on whether or not that information was
20 also provided to Special Agent DeCapua and the government.

21 MR. JACKSON: I think that's fair, your Honor.

22 THE COURT: All right.

23 MS. GRISWOLD: I have one other issue with respect to
24 Special Agent Amato. I think there was a pending objection at
25 the end of yesterday's testimony regarding Government

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1 Exhibit 3568, which was the IP log-in records for
2 omar@amanatcapital.com Yahoo account, and I believe the
3 objection was a hearsay objection.

4 I think there's two parts of this. One is the
5 business records declaration that the records themselves come
6 in, and I don't think that's Mr. Jackson's objection. I think
7 it's with respect to the question about running the IP address
8 through a database to determine whether or not they're -- a
9 proximate location of the computer logging in could be
10 determined.

11 As we proffered to Mr. Jackson, we believe that that
12 appropriately comes in under 803.17, which is the exception
13 that allows for market reports and similar commercial
14 publication, allows for compilations or databases that are
15 generally relied on by the public or by persons in particular
16 occupations. Special Agent Amato would testify that she used a
17 database called MaxMind, which is publicly and commercially
18 available but is generally and frequently used by the FBI to
19 look up IP addresses to determine the approximate location of
20 the computer connecting to a particular IP address, so we
21 believe it is proper under that exception, but I believe
22 Mr. Jackson still objects.

23 THE COURT: What do you say, Mr. Jackson? I have been
24 looking at 803.17, and just for the record, it provides as an
25 exception to the rule against hearsay, provides an exception

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1 for "market quotations, lists, directories or other
2 compilations that are generally relied on by the public or by
3 persons in particular occupations."

4 MR. JACKSON: Your Honor, this MaxMind website, it's a
5 private website that's online. This is not analogous to like
6 the National Crime Institute database or something like that.
7 I worked as a defense attorney and a prosecutor for many years
8 and I never heard of it. I take the agents at their word, but
9 I don't think this comes in as a market report or a list that
10 is of the type that 803.17 says has inherent indicia. Implicit
11 in that inherent indicia of authenticity, I don't know who
12 MaxMind is, I never heard MaxMind mentioned until Agent Amato's
13 testimony yesterday, was it, so I don't think it comes in under
14 803.17.

15 I also don't think this area is relevant, the IP
16 log-ins are in, the underlying address doesn't go to any issue
17 in this case.

18 MS. GRISWOLD: As to the first point, I think Special
19 Agent Amato will be able to lay a foundation to what MaxMind is
20 and the use of it by the FBI.

21 THE COURT: Just lay -- could you just spell it?

22 MS. GRISWOLD: One word, M-A-X-M-I-N-D, MaxMind.

23 THE COURT: Okay.

24 MS. GRISWOLD: And as to the relevancy point, I want
25 to make clear what we think the relevance is.

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1 THE COURT: And tell me what she's going to say
2 about -- sorry, MaxMind?

3 MS. GRISWOLD: MaxMind.

4 THE COURT: So what's she going to say about MaxMind?
5 Who is it accessible to? What is she going to say about it?

6 MS. GRISWOLD: It's publicly available. You can
7 access it through the internet. It's a private commercial
8 database. It is one of I think several, but a primary database
9 that the FBI frequently uses in order to look up -- it's
10 basically geolocation information. They compile -- MaxMind,
11 what they do is they compile information as to which internet
12 service providers and IP addresses, and they figure out where
13 the approximate location is, and then they provide that service
14 to the public. And I don't know if they get their revenue
15 through ads or exactly how that works, but she will testify
16 this isn't something that they came up for this case.

17 IP log-in information queries are commonplace in many,
18 many different kinds of investigations that are conducted by
19 the FBI, and that this is a reliable and generally used
20 database that they use to establish that information.

21 I'm happy to move on to address the relevancy if your
22 Honor would like.

23 MR. JACKSON: I have one thing to insert, I tried to
24 understand what MaxMind is. There's a Wikipedia page about
25 MaxMind, it literally has three sentences in it, and all it

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1 says is: In an unusual technical glitch, a farmstead about
2 four miles northeast of Potwin, Kansas became the default site
3 of 600 million IP addresses (due to their lack of fine
4 granularity) when the digital mapping company changed the
5 putative geographic center of the contiguous United States
6 leading to law enforcement agents and others visiting the
7 farmstead at all hours of the day and night. A lawsuit against
8 the company by the residents of the farmstead ensued. There is
9 no other information on Wikipedia page about MaxMind except
10 information about a failure of information that they had in
11 terms of their database that led to a lawsuit. This is an
12 obscure, private website. If you want accurate information
13 about an IP address, there is an accepted way to get it, which
14 is to go to the provider and get information, not to go to some
15 random website.

16 MS. GRISWOLD: Your Honor, you will make your
17 decision, but I don't think the agent will testify that it's a
18 random website. She will testify that it's used by the FBI and
19 they found it to be reliable in their cases. They found that
20 the IP address geolocation information that they have gotten
21 from that database has been accurate in the course of her
22 experience.

23 THE COURT: All right. I'll have to hear the
24 foundation and then I will rule.

25 And relevance?

HCKTTUZ1

1 MS. GRISWOLD: Relevance. The defendant proffered
2 that the emails at issue were authentic originally because they
3 were on his father's Yahoo account, and now he's arguing that
4 they were always on the Omar Amanat account. And there's no
5 explanation for why he didn't use that account to establish
6 authenticity in the first place.

7 And the log-ins here, which show log-ins into the Omar
8 Amanat account from at least August of 2017 through when the
9 trial began in November 2017, foreclose an argument by the
10 defendant that he only logged into the account after the
11 government levied its fabrication allegations in this case. I
12 don't know exactly what arguments Mr. Jackson is going to be
13 making, but I think it's relevant as to that point.

14 (Continued on next page)
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1 MR. JACKSON: I think the government is, and I
2 understand what Ms. Griswold is saying, conflating some of the
3 discussion about what our legal team did with what Mr. Amanat
4 was doing, and I think there's a lot of confusion about the
5 timeline.

6 There is no argument that we're going to be making
7 about why X or Y wasn't produced to the government at whatever
8 particular date. I don't think that that's relevant. I don't
9 think that the discussion between parties about how they got
10 the information is something that can be developed
11 appropriately through this case. There's no testimony from Mr.
12 Amanat; there's never been any representation from Mr. Amanat.
13 There are representations that are in the record as far as the
14 legal proceedings that have to do with what counsel understood
15 and did, and it's a separate question.

16 There's also some confusion, just to put it bluntly,
17 about what exactly was going on. I don't think this is for the
18 jury, but it's important to note Mr. Amanat has always had
19 these linked Yahoo accounts. Right? But the question was, at
20 one point we were notified that for the specific time period in
21 question, there was no relevant information, and that was an
22 impression I think my predecessor as well as I labored under
23 for a while.

24 There was never a belief that Mr. Amanat never had
25 access to these Yahoo accounts, and so the fact that he can log

HckWtuz2

1 on to the Yahoo accounts is irrelevant in any question.

2 THE COURT: Does that change your view in any way?

3 MS. GRISWOLD: It doesn't, your Honor. There's a
4 stipulation between the parties. We're not trying to insert
5 communications between the defendant and his attorney into
6 this, but it is going to be put before the jury that the Sharif
7 Amanat, his father's, Yahoo account was originally the basis
8 for the authenticity of these emails, so I do think it's
9 possible that the jury's going to be confused about what
10 happened here. And all we want on the record, and maybe they
11 won't draw out or make an argument from it, is something to
12 show that he was accessing the Omar Yahoo account in the time
13 period leading up to the trial.

14 THE COURT: It does seem to me that that last point is
15 relevant.

16 As to foundation, I'll just have to hear what the
17 agent says. We need to begin. The jury's been here for some
18 time.

19 The agent should retake the stand.

20 MS. GRISWOLD: Yes, your Honor.

21 (Continued on next page)
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HckWtuz2

Amato - Direct

1 (Jury present)

2 THE COURT: Please be seated.

3 Good morning, ladies and gentlemen. As I told you
4 yesterday, the case is winding down to a close. At the next
5 break, I would like you to talk amongst yourselves about
6 whether, once we get into closing arguments and jury
7 deliberations, the jury might be willing to sit until 5:00.
8 The summations are going to be lengthy, as you might expect,
9 given the length of the trial, so that's one reason. But also,
10 when you've reached the point of deliberations, you may find it
11 helpful to have a longer day than what we have been
12 traditionally utilizing here.

13 Please talk amongst yourselves about that, and when
14 you've reached a consensus, let me know what the jury's views
15 are on that. OK?

16 For today, we're going to resume the direct
17 examination of Agent Amato.

18 Agent, you remain under oath.

19 JULIE AMATO, resumed.

20 THE COURT: Ms. Griswold, please proceed.

21 MS. GRISWOLD: Thank you, your Honor.

22 DIRECT EXAMINATION

23 BY MS. GRISWOLD:

24 Q. Good morning, Special Agent Amato.

25 A. Good morning.

HckWtuz2

Amato - Direct

1 Q. At the end of yesterday's testimony, we were talking about
2 IP addresses?

3 A. Yes.

4 Q. Have you had training at the FBI about IP addresses?

5 A. Yes.

6 Q. Can you remind the jury generally what an IP address is?

7 A. The IP address is basically the unique address that's
8 identified so that people can tell what computer's connected to
9 the Internet.

10 Q. Special Agent Amato, when we concluded yesterday, you were
11 testifying about Government Exhibit 3568.

12 MS. GRISWOLD: Can we pull that back up on the screen,
13 Ms. Pyun.

14 Would your Honor like a hard copy, or do you have
15 yours from yesterday?

16 THE COURT: I have it. Thank you.

17 MS. GRISWOLD: Thank you.

18 Q. Do you recall that these were the IP records for log-ins to
19 the omar@amanatcapital.com account?

20 A. Yes.

21 Q. And you identified that between August 16 of 2017 and
22 November 9 of 2017, there was only one IP address used to log
23 in to that account. Is that correct?

24 A. That's correct.

25 Q. And that's the IP address listed in the column on the

HckWtuz2

Amato - Direct

1 screen?

2 A. Yes.

3 Q. Is there a database used by the FBI to look up IP addresses
4 to determine the approximate location of a computer connecting
5 to a particular IP address?

6 A. Yes. We use a couple of them.

7 Q. Did you use one in this case?

8 A. Yes, for this I used MaxMind.

9 Q. Can you explain for the Court what MaxMind is and how it is
10 used by the FBI?

11 A. Sure. So, MaxMind is publicly available. You just go to
12 Google, search MaxMind IP lookup, and it's basically a service
13 that's provided where you could type in an IP address like this
14 one here, and it will show you who the Internet service
15 provider is linked to that address, and it will also show you
16 the approximate geo-location of the IP address. And so we use
17 it in a lot of our investigations to try and determine the
18 service provider and also the location of the IP address.

19 Q. And has the FBI found MaxMind to be reliable with respect
20 to the information that it's provided in your investigations
21 for the location of the computer?

22 A. Yes. So, based on my training, it is known to be a
23 reliable service throughout the FBI.

24 Q. And when you ran this IP address through MaxMind, were you
25 able to determine a location?

HckWtuz2

Amato - Direct

1 A. Yes. So, it gives a latitude and longitude, which I don't
2 remember off the top of my head. But the city is Pine Brook,
3 New Jersey.

4 MS. GRISWOLD: Can we please pull up Government
5 Exhibit 630. This is a set of bank records in evidence in this
6 case. And please highlight the authorized signer information
7 on this account.

8 Q. Do you see that, Special Agent Amato?

9 A. I do.

10 Q. What is the name on the authorized signer information to
11 this account?

12 A. Omar Amanat.

13 Q. What is the home address?

14 A. 68 Windsor Drive, Pine Brook, New Jersey 07058.

15 MS. GRISWOLD: We can take that down. If we could
16 bring back up Government Exhibit 3583.

17 Q. This is the chart you were testifying about yesterday
18 regarding four emails that you looked for on Mr. Maiden's
19 computer. Do you recall this chart?

20 A. I do.

21 Q. And this was a chart memorializing your efforts to look for
22 a December 2, 2008, email at 11:07 p.m.?

23 A. That's right.

24 Q. Amanat Exhibit 9002?

25 A. Yes.

HckWtuz2

Amato - Cross

1 Q. Were you able to find that on Mr. Maiden's computer?

2 A. No.

3 Q. And Amanat Exhibit 908, the 11:33 a.m. email on March 10,
4 2009, were you able to find that on Mr. Maiden's computer?

5 A. No.

6 Q. And Amanat Exhibit 9010, the June 2, 2011, 6:13 p.m. email,
7 were you able to find that on Mr. Maiden's computer?

8 A. No.

9 Q. And Amanat Exhibit 9013, the 3/26, 2012, 11:34 a.m. email
10 were you able to find that on Mr. Maiden's computer?

11 A. No.

12 Q. Were you able to find any of the evidence of these emails
13 on Mr. Maiden's computer, such as an email chain where these
14 emails were responded to?

15 A. No, I was not.

16 MS. GRISWOLD: No further questions.

17 THE COURT: Cross-examination.

18 CROSS-EXAMINATION

19 BY MR. JACKSON:

20 Q. Good morning, Special Agent Amato.

21 A. Good morning.

22 Q. Now, Special Agent Amato, to be clear, what you've been
23 focusing on is just four documents, right, in your testimony
24 now?

25 A. Right, these four emails.

HckWtuz2

Amato - Cross

1 Q. And you're aware that all four of these emails were shown
2 to Mr. Maiden during his testimony, right?

3 A. I think in -- yeah, in redacted forms. That's right, yes.

4 Q. And during his testimony, Mr. Maiden didn't say anything
5 about these emails not being authentic, right?

6 A. That's correct.

7 Q. Now, am I correct --

8 MR. JACKSON: Actually, can we have GX2908.

9 Q. Am I correct that this is the email that you were looking
10 at on direct examination? Correct?

11 A. Yes, that's right.

12 Q. And this is from June of 2008, right?

13 A. That's right.

14 Q. And in this message, Omar Amanat is emailing his brother
15 and talking about deleting some emails from the Yahoo site and
16 downloading them onto the laptop, right?

17 A. Right.

18 Q. And Irfan Amanat says, "Set up your Outlook to pull all
19 your email from Yahoo and delete it"?

20 A. Yup.

21 Q. "If you need help, I can walk you through it"?

22 A. That's right.

23 Q. This email takes place in June of 2008, correct?

24 A. Yes.

25 Q. In June of 2008, as far as you know from your role as a

HckWtuz2

Amato - Cross

1 case agent here, Omar Amanat had never even met Steve Maiden,
2 right?

3 A. I'm not a 100 percent sure about that.

4 Q. You're not sure about that?

5 A. No. I'm sorry.

6 Q. Let me ask you this. You are aware that the charges in
7 this case don't involve any conduct in June of 2008, right?

8 MS. GRISWOLD: Objection.

9 THE COURT: Sustained.

10 MS. GRISWOLD: Mischaracterizes.

11 THE COURT: Sustained.

12 BY MR. JACKSON:

13 Q. Just to be clear, in June of 2008 -- first of all, there's
14 reference here to subpoenaing Yahoo?

15 A. Yes.

16 Q. Do you see that?

17 A. Yes.

18 Q. You're aware, right, Special Agent, that in civil suits
19 people can issue subpoenas, correct?

20 MS. GRISWOLD: Objection. Foundation.

21 THE COURT: You're going to have to lay a foundation
22 for her knowledge in civil suits.

23 MR. JACKSON: Sure.

24 Q. You have some familiarity with civil suits, right?

25 A. Vaguely with discussion, like, with SEC attorneys.

HckWtuz2

Amato - Cross

1 Q. Right. The SEC is one of the agencies that the FBI works
2 with frequently, right?

3 A. My squad does, yes.

4 Q. And you're aware that one of the issues that you have to
5 deal with when there's an SEC investigation and an FBI
6 investigation is that one is civil and one is criminal, right?

7 A. Yes.

8 Q. And we don't need to get into details, but there are some
9 legal requirements in terms of how those have to be defined as
10 either separate or joined, right?

11 MS. GRISWOLD: Objection. Foundation.

12 THE COURT: Sustained.

13 BY MR. JACKSON:

14 Q. Whatever the case may be, you're aware that the SEC issues
15 civil subpoenas, right?

16 A. Yes.

17 Q. You've also seen in the course of working as a case
18 agent -- well, you're familiar with the fact that subpoenas can
19 be sent in civil suits; you've seen that before in your work,
20 right?

21 A. Yes.

22 Q. And so just in terms of your work as a case agent, you are
23 aware that Omar Amanat participated in civil litigation about
24 various business issues before this ever happened, right?

25 MS. GRISWOLD: Objection.

HckWtuz2

Amato - Cross

1 THE COURT: Sustained.

2 Q. Well, I just want to ask you -- all right. We'll move on.

3 One thing you testified about just now --

4 MR. JACKSON: You can take this down.

5 Q. -- is that you looked through Steve Maiden's computer to
6 try to find evidence of the four emails that are in question?

7 A. Right, if I could see the actual email.

8 Q. It's a fact, though, right, as you testified on your
9 direct, Steve Maiden's computer had at least one large gap in
10 emails on the computer? Right?

11 A. Yes.

12 Q. And during, this is a period when you would have expected
13 hundreds of emails to come to Steve Maiden, right?

14 A. I don't know.

15 Q. During the course of your analysis, did you ever try to
16 determine approximately how many emails Mr. Maiden got on a
17 daily basis?

18 A. On four specific days I did that.

19 Q. Can you give us a rough estimate of what you saw in terms
20 of the number per day?

21 A. I think there were usually at least a hundred.

22 Q. OK. So at least a hundred, usually, per day, right?

23 A. Yeah.

24 Q. And the period that you said there was a gap in
25 Mr. Maiden's, a noticeable gap in Mr. Maiden's email extended

HckWtuz2

Amato - Cross

1 from the end of January 2009 into March, right?

2 A. Right. Emails appeared again on March 10, 2009.

3 Q. So we're talking about at least 40 days, right?

4 A. Yes.

5 Q. Sorry.

6 A. Maybe a little less.

7 Q. I'm not sure I can do the math.

8 A. Yeah.

9 Q. But by your estimate, that could mean that just for that

10 gap, at least 4,000 emails would appear to be missing from

11 Mr. Maiden's computer, right?

12 A. It could mean that, yes.

13 Q. And you have no way of knowing whether there are additional

14 gaps in Mr. Maiden's computer that you weren't able to see,

15 right?

16 MS. GRISWOLD: Objection.

17 THE COURT: Sustained.

18 Q. To be very clear, the reason you're able to notice the gap

19 that you're talking about is because it's so big, right?

20 THE COURT: You're talking about the January to March

21 period.

22 MR. JACKSON: Exactly, Judge.

23 A. Yes.

24 Q. It might be hard to determine, right, if there was like a

25 two-hour gap when emails were missing?

HckWtuz2

Amato - Cross

1 A. Yeah, that's right.

2 Q. Emails could be gone, and the FBI would have no way of
3 detecting it, right?

4 A. I don't know what our forensic examiners are able to
5 detect, but I wouldn't be able to detect it.

6 Q. Sure.

7 A. Yeah.

8 Q. And I know you're doing a lot of hard work on this, but
9 you're not a forensic examiners of computers, right?

10 A. That's certainly true.

11 Q. That's a relatively specialized area that's handled by the
12 CART team at the FBI, right?

13 A. That's right.

14 Q. As far as you know, the FBI didn't do a CART analysis to
15 determine whether there were any fragments on Mr. Maiden's
16 computer that would help you understand whether specific items
17 had been deleted that were not visible in his PSTs?

18 THE COURT: You used the term "CART analysis"?

19 MR. JACKSON: Yes, your Honor.

20 THE COURT: If you're going to use it, you need to
21 elicit from the witness what that means.

22 MR. JACKSON: Yes, that's very helpful, Judge.

23 Q. Special Agent Amato, could you explain to the members of
24 the jury what the CART team is?

25 A. Yeah. So, the CART team is a team within the FBI that we

HckWtuz2

Amato - Cross

1 usually use for digital evidence. They help us download and
2 put it in a useable format, among other things.

3 Q. OK. Thank you so much, Agent. And all I'm asking is, as
4 far as you know, the CART team didn't do any of the type of
5 analysis I was just referring to on Mr. Maiden's computer,
6 right?

7 MS. GRISWOLD: Objection. Form.

8 THE COURT: Sustained.

9 Q. As far as you know, the CART team didn't do any analysis on
10 Mr. Maiden's computer, right?

11 A. They were involved.

12 Q. OK. Do you know if the CART team came to a determination
13 as to whether or not emails had been deleted from Mr. Maiden's
14 computer?

15 A. That I don't know.

16 Q. You also talked a little bit about the emails in the
17 deleted folder on Mr. Maiden's computer?

18 A. That's right.

19 Q. And to be clear, there were hundreds of items in the
20 deleted folder -- folders -- on Mr. Maiden's computer, right?

21 A. Yes, that's right.

22 Q. Some of those were email drafts, right?

23 A. Correct.

24 Q. Some of them were actual emails sent and received?

25 A. Correct.

HckWtuz2

Amato - Cross

1 Q. Some of them were contact information?

2 A. Correct.

3 Q. And you understand, right, that when an email is in a
4 deleted folder at the time a computer's imaged, that means it
5 was placed into recycling and had not yet expired, right?

6 MS. GRISWOLD: Objection. Foundation.

7 THE COURT: You need to lay a foundation with her
8 about that.

9 MR. JACKSON: Judge, can I just ask an open-ended
10 question of the agent.

11 Q. Do you know what it means for an email to be in a deleted
12 folder at the time that an image expires -- I mean, at the time
13 that the computer is imaged?

14 A. Other than the fact that when you have -- the deleted-items
15 folder is there, that's about the extent of it.

16 Q. Right.

17 A. Yeah.

18 Q. You're aware from your work as an FBI agent that it's
19 possible to hard delete items on a computer, right?

20 MS. GRISWOLD: Objection. Foundation.

21 THE COURT: Sustained.

22 Q. Have you ever worked with the hard deletion of emails?

23 MS. GRISWOLD: Objection.

24 THE COURT: I think you need to establish that she
25 knows what the term "hard delete" means.

HckWtuz2

Amato - Cross

1 MR. JACKSON: Thank you, Judge.

2 Q. Do you know what I mean when I say hard delete?

3 A. I don't.

4 Q. What about permanently delete?

5 A. As in, like, dragging your trash and emptying your trash?

6 Q. Exactly.

7 A. I don't -- I know sometimes things can be recovered still
8 when that happens, so --

9 Q. And you also know that sometimes they can't be recovered
10 after that happens, right?

11 A. Yes.

12 Q. And the FBI has no way of knowing what, if anything,
13 Mr. Maiden deleted and removed from the recycling bin, right?

14 THE COURT: Sustained.

15 Q. Are you aware of whether or not, in assessing Mr. Maiden's
16 email traffic, the FBI ever did any analysis of any email
17 accounts of Michael Yavelberg?

18 A. I'm not aware of any such analysis.

19 Q. Are you aware of whether or not the FBI did any analysis of
20 the email accounts of Jamie Yavelberg?

21 A. I'm not aware.

22 Q. You are aware, in your role as case agent, that after his
23 original testimony Mr. Maiden reached out to Jamie Yavelberg?

24 MS. GRISWOLD: Objection.

25 THE COURT: Sustained.

HckWtuz2

Amato - Redirect

1 MR. JACKSON: Just one moment, your Honor.

2 Q. Just to be very clear, it's your belief that Mr. Maiden did
3 actually receive emails that are no longer on his computer
4 during that gap in time that you described, in January to March
5 of 2009?

6 A. I would expect that he did, yes.

7 MR. JACKSON: Special Agent Amato, thank you very
8 much. I don't have any further questions.

9 THE COURT: Any redirect?

10 MS. GRISWOLD: Two questions, your Honor.

11 REDIRECT EXAMINATION

12 BY MS. GRISWOLD:

13 Q. Special Agent Amato in the course of your work as a
14 criminal FBI agent, are you aware of whether or not there are
15 criminal subpoenas that can be issued?

16 A. Yes.

17 Q. Are there?

18 A. Yes.

19 Q. The gap that you testified about on Mr. Maiden's computer
20 is from January 2009 to early March 2009, is that correct?

21 A. Yes. The last emails appeared on January 31, so it's the
22 end of January.

23 MS. GRISWOLD: If we could put back up for Special
24 Agent Amato the chart that we were looking at, Government
25 Exhibit 3583.

HckWtuz2

Amato - Redirect

1 Q. Does the gap on Mr. Maiden's computer cover any of the
2 dates that are listed on Amanat Exhibits 9002, 908, 9010 and
3 913 --9013?

4 THE COURT: 9013, right?

5 MS. GRISWOLD: 9013. Thank you, your Honor.

6 A. So, for Amanat Exhibit 908, emails appear began appearing
7 again in Mr. Maiden's account on March 10, 2009.

8 Q. So there are emails --

9 A. There are emails for March 10, 2009.

10 Q. Are there emails for December 2, 2008?

11 A. Yes.

12 Q. Are there emails for June 2, 2011?

13 A. Yes.

14 Q. Are there emails for March 26, 2012?

15 A. Yes.

16 MS. GRISWOLD: No further questions.

17 THE COURT: Anything else, Mr. Jackson?

18 MR. JACKSON: No. Thank you, your Honor.

19 THE COURT: You can step down, Agent.

20 (Witness excused)

21 THE COURT: The government will call its next witness.

22 MS. GRISWOLD: The government calls Special Agent Joel
23 DeCapua.

24 MR. WEITZMAN: Your Honor, may we approach?

25 THE COURT: Yes. (Continued on next page)

HckWtuz2

Amato - Redirect

1 (At sidebar)

2 MR. WEITZMAN: I just want to put on the record my
3 client isn't feeling so well today, Judge. He has an upset
4 stomach, and he'll be in and out of the courtroom at times. We
5 waive his presence during the times he's out of the courtroom.

6 THE COURT: Thank you, Mr. Weitzman.

7 MR. WEITZMAN: You're welcome.

8 (Continued on next page)

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HckWtuz2

DeCapua - Direct

1 (In open court)

2 JOEL DECAPUA,

3 called as a witness by the Government,

4 having been duly sworn, testified as follows:

5 THE COURT: Please proceed.

6 MS. GRISWOLD: Thank you, your Honor.

7 DIRECT EXAMINATION

8 BY MS. GRISWOLD:

9 Q. Good morning.

10 A. Good morning.

11 Q. Where do you work?

12 A. I work at the Federal Bureau of Investigation.

13 Q. What is your position there?

14 A. I'm a special agent.

15 Q. What squad are you assigned to?

16 A. I'm assigned to cyber crimes task force on squad CY-2.

17 Q. How long have you been on the cyber crimes task force?

18 A. I first joined in 2014.

19 Q. How long have you been with the FBI in total?

20 A. Since 2009, so I believe it's nine years.

21 Q. Between 2009 and 2014, what type of squad were you assigned
22 to?

23 A. Prior to the cyber crimes squad, I was assigned to a squad
24 focused on securities fraud and public corruption.

25 Q. Did those cases involve the review of emails?

HckWtuz2

DeCapua - Direct

1 A. Yes, they did.

2 Q. Turning back to the cyber squad, what types of cases does
3 your squad investigate?

4 A. Generally we investigate any type of hacking case or cyber
5 crime case that has any criminal nexus as opposed to a national
6 security nexus.

7 Q. Have your cases while on the cyber squad involved the
8 execution of email search warrants?

9 A. Yes.

10 Q. Have your cases involved the examination of computers for
11 email content?

12 A. Yes.

13 Q. I want to turn to some of the training that you've
14 undertaken at the FBI in the area of electronic or digital
15 evidence. When new agents join the FBI, is there any training
16 in digital forensics?

17 A. There is. At Quantico, we are given new-agents training,
18 which includes training on how to review email headers, how to
19 investigate crimes involving the Internet and generally how to
20 go about gathering digital evidence and then analyzing it for
21 review.

22 Q. Before we turn to additional training, you just used the
23 term "email headers." Can you describe for the jury what you
24 mean by that term?

25 A. Sure. So, I've learned that emails are -- they're made up

HckWtuz2

DeCapua - Direct

1 of two parts. The first part is the content, which is what you
2 would see on the screen, the words or the links or whatever is
3 in the email, and the other part is the header, which is mostly
4 invisible to someone who sends or receives an email, but if you
5 know where to look, you can, you can find the header and you
6 can analyze it, and it's useful to us because it has good
7 forensic artifacts that we can study.

8 Q. Once you became a cyber agent in 2014, did you receive
9 additional training in the area of digital forensics?

10 A. I did.

11 Q. Can you describe that training, please?

12 A. So, there was on-the-job, sponsored by the FBI, digital
13 forensics training. Some of it was self-study. Some of it
14 was, I would go on the Internet and go through a course of
15 study. Some of it was in person. Most of it was through a
16 private company called SANS. At SANS I took a lot of training
17 to include a lot about how to analyze email headers and digital
18 forensics, and I was tested on that training. I received
19 certifications on it.

20 MS. GRISWOLD: If we could please pull up for the
21 witness, counsel and the Court what is marked as Government
22 Exhibit 3584.

23 Would you like another copy, your Honor?

24 THE COURT: I have it. Thank you.

25 BY MS. GRISWOLD:

HckWtuz2

DeCapua - Direct

1 Q. Do you recognize Government Exhibit 3584, Special Agent
2 DeCapua?

3 A. I do.

4 Q. How do you recognize it?

5 A. It is a résumé I created.

6 MS. GRISWOLD: The government offers Government
7 Exhibit 3584.

8 THE COURT: Any objection?

9 MR. JACKSON: No objection.

10 MR. WEITZMAN: No objection.

11 THE COURT: 3584 is received.

12 (Government Exhibit 3584 received in evidence)

13 MS. GRISWOLD: Permission to publish?

14 THE COURT: Yes.

15 BY MS. GRISWOLD:

16 Q. Is this a résumé, your résumé?

17 A. Yes.

18 Q. And it has three sections: career summary; certifications,
19 training and professional affiliations; and finally, education?

20 A. That's correct.

21 Q. I want to focus on the middle section, certifications,
22 training and professional affiliations. Can you identify which
23 of these certifications -- first of all, what is GIAC that
24 appears in a number of places here?

25 A. GIAC is an entity that tests and certifies practitioners of

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1 digital forensics.

2 Q. Is GIAC a place that is used by FBI cyber agents to obtain
3 certifications and training?

4 A. Yeah, that's correct.

5 Q. Which of these certifications is relevant to the analysis
6 of emails and email headers?

7 A. So, of these certifications, I think the first one that's
8 relevant is the March 2008 certified fraud examiner. You learn
9 some things about digital forensics and analyzing emails, in
10 that course of certification. I'm no longer certified; I've
11 let it lapse.

12 The March 2015 certification, the GSEC, is another course
13 of study I took where we learned about digital forensics, and
14 there's a part in that course of study that involves the
15 analysis of emails and email headers. It culminates in a
16 five-hour test that I took and passed, and that's why I
17 received this certification.

18 July 2015 certification, certified forensic examiner, is
19 a -- is another course of study, and then a, a certification
20 test that I took that involved analysis of digital evidence and
21 email headers.

22 The next one would be October 2016 course, the certified
23 forensic analyst, which is another course of study that goes
24 through how to analyze email headers and how to handle digital
25 evidence, and I took a certification course and I'm certified

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1 in it.

2 The March 2017, the network forensic analyst, is another
3 that handles additional topics in how to analyze email headers.
4 And the March 2017 course, the FBI-sponsored digital extraction
5 technician training, it is another that -- it's a two-week
6 course with, culminating in a test and which I took and passed,
7 which is about the extraction of digital evidence and the
8 analysis and review afterward.

9 Q. In total, approximately how many email headers have you
10 reviewed in your career?

11 A. Hundreds.

12 MS. GRISWOLD: You can take that down, please.

13 Q. Are you familiar with the term "web mail"?

14 A. I am.

15 Q. What is it?

16 A. Web mail is a service like GMail or HotMail or Yahoo Mail,
17 that allows you to send and receive emails using their email
18 servers. You log in and you create an account and you can use
19 it to send and receive emails.

20 Q. Are you familiar with the term "local email client"?

21 A. I am.

22 Q. What does that term mean?

23 A. A local email client is a piece of software that you have
24 on your computer or your phone, even, such as Outlook or Apple
25 Mail or Thunderbird, that allows you, from your personal

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1 computer, to interact with one of the web mail services so you
2 can type up emails on your home computer and click send in
3 Outlook and it will automatically reach out to the, to the web
4 mail service and make sure everything is synced and sent and
5 received properly.

6 Q. Are you familiar with any protocols that allow local email
7 clients, such as Outlook or Apple Mail, to communicate with a
8 web mail account, such as Yahoo?

9 A. Yeah, there's several protocols that are used. The most
10 familiar is the IMAP protocol.

11 Q. Is that I-M-A-P?

12 A. Yes.

13 Q. Can you describe that?

14 A. So, it stands for the Internet message access protocol, and
15 it's just an agreed upon -- a protocol is an agreed-upon
16 language that two computers or two servers will use to
17 communicate with each other and exchange information. And
18 specifically IMAP is used for the communications between an
19 email server such as the one that Google would have or
20 something that your employer might have and the local email
21 client, such as Outlook.

22 Q. Are you familiar with the term "spoofing"?

23 A. I am.

24 Q. What is it?

25 A. Spoofing generally refers to, in the context of emails,

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1 when someone is forging an email. Either they're making it
2 seem like it's coming from someone who never sent it or they're
3 changing the date or changing the content or changing some
4 other aspect of the email in order to make it fraudulent.

5 Q. And do you have training at the FBI on spoofing?

6 A. I do.

7 Q. Does that involve the review of email headers?

8 A. It does.

9 MS. GRISWOLD: Your Honor, may Special Agent DeCapua
10 offer an opinion related to the analysis of electronic
11 evidence, including email headers and email platforms?

12 THE COURT: Any objection?

13 MR. JACKSON: No, your Honor.

14 THE COURT: Yes, he may offer opinion testimony on
15 those subjects.

16 MS. GRISWOLD: Thank you, your Honor.

17 MR. JACKSON: Your Honor, just to be clear, as we
18 previously discussed.

19 THE COURT: Yes.

20 MS. GRISWOLD: I'd like to show the witness what is in
21 evidence as Government Exhibit 2908, please.

22 Q. If you could direct your attention to the June 14, 2008,
23 email at 2205. If you could read that, please, Special Agent
24 DeCapua. It's an email from Omar Amanat to Irfan Amanat.

25 A. "Hey Iffi, I also want to delete all of my emails from the

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1 Yahoo site but download them onto my laptop. How can I do
2 this? I'm concerned about them subpoenaing Yahoo at some
3 point."

4 MS. GRISWOLD: If we could please go to Irfan Amanat's
5 response at 2321.

6 Q. If you could please read the response.

7 A. "Set up your Outlook to pull all your emails from Yahoo and
8 delete it. If you need help, I can walk you through it."

9 Q. Based on your training and experience as an FBI agent and
10 on dealing with email evidence, are you familiar with how to
11 pull emails from a web mail account such as Yahoo, onto a local
12 client account such as Outlook?

13 A. I am.

14 Q. Do you need any special FBI or proprietary software to do
15 this?

16 A. No.

17 MS. GRISWOLD: At this time, your Honor, we would ask
18 that Special Agent DeCapua be allowed to hook up his laptop so
19 he can provide a brief demonstration to the jury.

20 THE COURT: Yes.

21 Q. In preparation for your testimony, did you create a web
22 mail account on Yahoo to use for a demonstration?

23 A. I -- yes, I did.

24 Q. Is jamessmith53490@yahoo.com the account you created?

25 A. It is.

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1 Q. And to create this account, did you go to yahoo.com?

2 A. I did.

3 Q. If you could keep your voice up as well. Thank you.

4 Let's pull up yahoo.com on your computer.

5 So we're at yahoo.com. Can you go ahead and log in to the
6 James Smith account that you created?

7 A. Certainly. So I logged into it previously so it
8 automatically saved my password and user name, and it just
9 opened up into the web mail access point for the James Smith
10 account.

11 Q. Did you receive an email from the government in preparation
12 for your demonstration today?

13 A. I did.

14 Q. Is that email in your inbox for this account?

15 A. Yes, it is.

16 Q. Can you open that up? Is this the email from Mr. Naftalis
17 on December 18 at 8:58 p.m.?

18 A. It is.

19 Q. And the content of that email says, "Hi, Joel"?

20 A. That's correct.

21 Q. Can you tell the jury where you find the header information
22 for this email?

23 A. So, every service is different. On Yahoo you have to go to
24 "more" and then "view raw message."

25 Q. What are we looking at now?

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1 A. So as I testified before, an email is made up of two parts,
2 the content and then the header. Right here, you see all this
3 seemingly random numbers and dates. This is all part of the
4 header. It isn't until you get down to the very bottom that
5 you see the actual content, which is just the words "Hi, Joel."
6 And, of course, however long the content is and whether there's
7 links or anything else, it will be included after the header
8 information.

9 MS. GRISWOLD: And the Message-ID that's in the
10 middle, can we highlight that. Scroll down a little.

11 Q. Do you see that?

12 A. I do.

13 Q. Are you familiar with the term "Message-ID"?

14 A. I am.

15 Q. What is it?

16 A. So, as I said before, as a, as a forensicator, there's
17 certain things in a message header that we find has value as
18 digital artifacts, and one of those things in particular is
19 something called a Message-ID. Now, a Message-ID is completely
20 invisible to you when you send or receive an email unless you
21 go in and view the raw message, but the Message-ID is -- it's a
22 unique number that is assigned to every single email that's
23 sent, and it -- there's certain characteristics of it that we
24 can analyze and we can make certain conclusions about the
25 underlying email.

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1 Q. You just used the term "forensicator." What does that term
2 mean?

3 A. A forensicator is something that is used colloquially
4 within the digital forensics community just to refer to someone
5 who practices digital forensics.

6 THE COURT: You've also used the term "digital
7 artifact." Could you tell us what you mean when you say
8 digital artifact.

9 THE WITNESS: Absolutely. So an artifact just means
10 something that we find that can give us some insight on what
11 happened in the past. If you're Indiana Jones, you're looking
12 at sarcophaguses and writings on walls. For us, we're looking
13 for things like time stamps or any other pieces of data that
14 can tell us what happened in the past.

15 THE COURT: With respect to an email message.

16 THE WITNESS: That's correct. We use the term
17 generally throughout digital forensics, but in respect to an
18 email header and message, there's also forensics -- there's
19 also digital artifacts within a header.

20 THE COURT: OK.

21 BY MS. GRISWOLD:

22 Q. Do you have a local email client on your laptop?

23 A. I do.

24 Q. What do you have?

25 A. I have Apple Mail.

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1 Q. Can you show the jury how you're able to pull this email
2 from the Yahoo account onto your local email client?

3 A. Absolutely.

4 Q. And if you could just narrate the steps that you're taking
5 when you're doing it.

6 A. So the first thing I do, and you may recognize this
7 program, is just open up the mail program, and because I've
8 never set it up before, it's going to ask me for my user name
9 and password. When I hit create, it's reaching out to Yahoo's
10 server and it's authenticating that my password is correct, and
11 then it's going to prompt me with an option to set up the
12 account, and when I do, the local email client is going to
13 reach out to the server hosted by Yahoo. They're going to
14 communicate over the IMAP protocol, and they're going to sync.
15 And what that means is the local email client is going to look
16 at Yahoo's server and say, Is there anything here that's not on
17 the local email client? And it's going to find the email
18 message that Mr. Naftalis sent me and it's going to pull that
19 down onto my local email client, so I push "create."

20 Q. And the inbox that we're looking at now, is that from your
21 Apple Mail?

22 A. Yes, it is. And so here, you see it took a few seconds,
23 but it pulled down the email that was stored on Yahoo's server.

24 Q. Can you open that email up?

25 Now, can you pull this email onto your laptop and save

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1 it onto your laptop?

2 A. Yes.

3 Q. Can you walk the jury through how you do that and narrate
4 as you just did?

5 A. Sure. So the easiest way, it is technically on my laptop
6 right now, but in order to save it on my laptop and a place
7 that I know how to quickly get to it, I would just export my
8 mailbox. And to do that I would go to "mailbox," "export
9 mailbox." It will ask me where I want to put it. I'm just
10 going to say on the desktop, and you'll see there's a new file
11 here called inbox.mbox, and that's where the emails are stored.

12 Q. Can you open up the email you just saved on your desktop?

13 A. Sure.

14 MR. JACKSON: Objection, your Honor.

15 THE COURT: Grounds.

16 MR. JACKSON: Scope. Discussion yesterday.

17 THE COURT: All right. I'll hear you at sidebar.

18 (Continued on next page)

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1 (At sidebar)

2 THE COURT: All he's done so far is he's brought it
3 down from the Yahoo server. He's stored it on the desktop of
4 his laptop, and she's asked him whether he can open up the
5 email. I didn't see that as implicating any of our discussion
6 yesterday. Are you troubled by anything that's happened so
7 far?

8 MR. JACKSON: Your Honor, I'm just a little bit
9 concerned about what the next step is.

10 THE COURT: OK. So you want to know what's happening
11 next.

12 MR. JACKSON: I want to know what's happening next
13 because it's not clear to me why we need to take the last step.

14 MS. GRISWOLD: The steps that we took, our view is
15 that's exactly consistent with what Government Exhibit 2908
16 says. It says pull from Yahoo onto Outlook and onto my laptop.
17 He's now shown it exists on his laptop. Now we're just going
18 to delete it from Yahoo. I'm not going to at this point say,
19 Can you alter it, or anything like that.

20 When we get to the later testimony, he's going to
21 testify about the specific features of the emails that he
22 looked at that were produced by the defendant, but at this
23 point, I'm not intending to do anything else with this, messing
24 with this email.

25 MR. JACKSON: OK. Thank you. I appreciate that. The

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1 one thing I will say, your Honor, is that going back to Yahoo
2 and deleting the email was not part of what the government's
3 proffer was as to what the demonstration would be yesterday. I
4 think this is the end of what they proffered to demonstrate,
5 their efforts to go back to the email in Yahoo and delete.

6 Now I understand there's an email where my client
7 discusses it, but I think it's much more speculative testimony
8 in terms of the demonstration. We're no longer demonstrating a
9 function that is a contested function that they can connect,
10 something that theoretically could have happened. We're now
11 going into something that's beyond the scope of their proffer,
12 and I don't think it's necessary. I think you can ask Special
13 Agent DeCapua, Can you delete the email from Yahoo without
14 doing a demonstration of that, and I wouldn't object to that.

15 MS. GRISWOLD: I disagree. We've tried to be very
16 careful, but the email says delete the messages from Yahoo.

17 THE COURT: I agree.

18 (Continued on next page)

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1 (In open court)

2 BY MS. GRISWOLD:

3 Q. Now that you have the email saved on your desktop, can I
4 ask you to close out of that file and go back to Yahoo and show
5 the jury how you can delete the email from both Yahoo and your
6 local email client?

7 A. So now I'm back to Yahoo. And there's just the one email,
8 so I just click it and go to delete. And then I would just
9 empty my trash. And in doing so, the email no longer exists at
10 Yahoo. The only place the email exists right now is on my
11 laptop computer.

12 Q. Did you use any FBI or proprietary software to do the
13 demonstration that you just provided?

14 A. No. This is all stuff just out of the box.

15 Q. What do you mean when you say out of the box?

16 A. It comes preloaded on the computer.

17 Q. Based on your experience as an FBI agent and obtaining
18 search warrants, email search warrants, if you were to obtain
19 an email search warrant for all email content in this James
20 Smith account at this moment, what would you expect to receive
21 in response?

22 A. I would --

23 MR. JACKSON: Objection.

24 THE COURT: Do you want to approach on this?

25 MR. JACKSON: Yes, your Honor.

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THE COURT: OK.

(Continued on next page)

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1 (At sidebar)

2 THE COURT: The point is that the email no longer
3 exists on the email server.

4 Is that your point?

5 MS. GRISWOLD: Yes.

6 THE COURT: And you object.

7 MR. JACKSON: Yes, your Honor. I don't think the
8 witness has a foundation for that, and I think it's factually
9 incorrect. In fact, I think it's widely advertised by most of
10 the web mail services that you can delete your account and
11 recover it with some --

12 MS. GRISWOLD: But at this moment --

13 I'll let you finish your thought.

14 MR. JACKSON: The question was, What would you expect
15 to recover if you issued a search warrant? I don't think that
16 this witness could testify that if a warrant was issued to
17 Yahoo it would be able to get the content we just saw. If it
18 was recoverable, then certainly it's conceivable to me that
19 Yahoo --

20 MS. GRISWOLD: I don't think that that would be his
21 testimony. The only place that that email exists now is on his
22 laptop. Yahoo would only have what's on their servers, and
23 there's nothing on that server right now.

24 MR. JACKSON: This witness does not have sufficient --

25 THE COURT: I tend to agree that there is no

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1 foundation at this point for him to testify about what would be
2 produced in response to a search warrant if Yahoo got one now
3 for the James Smith account.

4 MS. GRISWOLD: OK. I'll move on.

5 (Continued on next page)

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1 (In open court)

2 BY MS. GRISWOLD:

3 Q. So the Yahoo account at this point has no emails in it,
4 correct?

5 A. Correct.

6 Q. In the James Smith account?

7 A. Correct.

8 MS. GRISWOLD: OK. We can close out of the
9 demonstration. Thank you.

10 Q. Now, the process that you just demonstrated, does it work
11 the other way; that is, can you take the email on your laptop
12 and put it back into the Yahoo account using the method that
13 you just demonstrated?

14 A. Yes, you can.

15 Q. Based on your experience, the way that a web mail account
16 and the local email client account interact, are you able to
17 offer an opinion on whether the fact that an email exists in a
18 web mail account means the email is authentic?

19 MR. JACKSON: Objection. Vague.

20 THE COURT: All right. I'll hear you at sidebar.

21 (Continued on next page)

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DeCapua - Direct

1 (At sidebar)

2 THE COURT: I thought we covered this yesterday. I
3 thought you were OK with this question, but it appears that
4 you're not.

5 MR. JACKSON: No, your Honor. You're right, I'm OK
6 with this concept. My problem is the language of the question.

7 THE COURT: OK.

8 MR. JACKSON: Does it mean that the email is
9 authentic, I don't know what that means in the context of that
10 question. When you talk about all the "if there's an email
11 that is in an account, it's an authentic something," OK, so I
12 just think that the question leaves a great degree of
13 ambiguity, and it's very difficult for me to interrogate.

14 MS. GRISWOLD: Then I can ask him whether or not prior
15 to putting it back up on the Yahoo account it's possible to
16 make changes. I don't have to link it to the specific emails
17 at issue here, if that's your concern; then that would be the
18 natural question to ask.

19 MR. JACKSON: I think that we already went over the
20 fact that I don't think this witness has sufficient, I don't
21 think this witness has sufficient basis to offer that specific
22 opinion, but I think the question -- this is just my
23 suggestion. I think the question that should be asked is, Does
24 the fact that an email is in a Yahoo account mean that the
25 email was necessarily sent when the email purports to have been

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1 sent.

2 THE COURT: Or you could ask something like, Can you
3 conclude from the presence of an email on the Yahoo web mail
4 service that it accurately reflects content, date sent?

5 MR. JACKSON: I think the judge's question is the best
6 question.

7 MS. GRISWOLD: And then I'm going to say why not, and
8 he's going to say because if you have control of the account,
9 you can make alterations to it. That was the testimony at the
10 hearing as well. I just want to be clear so we don't come back
11 for another sidebar. So the clear question that the Court
12 thinks is most appropriate would be to ask whether or not based
13 on the email in the Yahoo account you can tell whether or not
14 the person who is sending, the time, the details in it are, in
15 fact, authentic.

16 MR. JACKSON: It's the word "authentic." What the
17 Court said was whether you can tell whether that information --

18 THE COURT: Maybe we should write it down.

19 MS. GRISWOLD: I apologize, your Honor.

20 THE COURT: I'll get a piece of paper. My question
21 started with, Can you conclude from the presence of an email on
22 a web mail service such as Yahoo that it accurately reflects
23 the date it was sent, the content of the email and the sender
24 and recipient?

25 MR. JACKSON: Thank you,. (Continued on next page)

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1 (In open court)

2 BY MS. GRISWOLD:

3 Q. Special Agent DeCapua, can you conclude from the presence
4 of an email in a Yahoo account, on the Yahoo servers, that the
5 email in that account accurately reflects the date it was sent?

6 A. Absolutely not.

7 Q. Can you conclude from the presence of the email in a Yahoo
8 account that it accurately reflects the content of the email?

9 A. You cannot.

10 Q. Can you conclude from the presence of the email in the
11 Yahoo account that it accurately reflects the sender or
12 recipient?

13 A. You cannot.

14 Q. Why not? And keep your voice up?

15 A. The reason is an email is not self-authenticating, so if it
16 appears in one place, that doesn't mean anything because it can
17 be spoofed and put there using a technique that is out there
18 that people know how to do, and it involves using the IMAP --

19 MR. JACKSON: Objection, your Honor.

20 THE COURT: Sustained. Sustained.

21 MR. JACKSON: Move to strike the last answer.

22 THE COURT: The entire last answer?

23 MR. JACKSON: No, your Honor. Just the last part,
24 from "out there."

25 THE COURT: Yes. The answer from the point of "out

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1 there that people know," and the remaining part of the answer
2 is struck from the record, and the jury should disregard it.

3 BY MS. GRISWOLD:

4 Q. Special Agent DeCapua, when an individual has control over
5 their own web mail account, such as the control that you have
6 with the James Smith account, do they have access to the header
7 information of the email?

8 A. They do.

9 Q. And are they able to alter the information in that
10 header --

11 A. Yes, they --

12 Q. -- if they have control over the account?

13 A. Yes, they are.

14 Q. Are they able to alter the content if they have access to
15 the account?

16 A. Yes, they are.

17 Q. Now I want to turn to some of the specific emails in
18 evidence in this case. Let me ask you to define a few terms.
19 You talked about the Message-ID before. Are you familiar with
20 the term "epoch," E-P-O-C-H?

21 A. Yes, I am.

22 (Continued on next page)

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1 BY MS. GRISWOLD:

2 Q. What does it mean?

3 A. So an epoch time stamp is a way of telling time and date.

4 We use the Julian calendar, March 15, 2009. Computers use
5 something that is easier for them to understand, and the most
6 commonly used way for computers to tell the time and date is
7 something called an epoch timestamp, which all it is is the
8 number of seconds that have a passed since midnight

9 January 1st, 1970 in Greenwich Mean Time, and it's a number in
10 the billions right now, and most forensic timestamps we see are
11 in epoch timestamp format.

12 THE COURT: You just mentioned Greenwich Mean Time.
13 What is Greenwich Mean Time?

14 THE WITNESS: Greenwich Mean Time is the time zone
15 that London, England is in.

16 BY MS. GRISWOLD:

17 Q. How frequently have you come across epoch timestamps in the
18 course of your review of email headers?

19 A. This would be the first time that I have looked at an epoch
20 timestamp in a email header, but in my review of digit
21 evidence, it's all the time.

22 Q. And when you say "all the time," can you give us an example
23 of where you have come across an epoch timestamp?

24 A. You find it in network logs mostly. When someone tells us
25 they were hacked and we ask for the network logs and we're

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1 trying to figure out when dates and times that things happened,
2 most of it will be in an epoch timestamp, and I would have do
3 the conversion from epoch to something that I can understand.

4 Q. Two more terms before we turn to some emails. Are you
5 familiar with the format UUID?

6 A. I am.

7 Q. What does it stand for and what does it mean?

8 A. UUID stands for Universal Unique Identifier. And what it
9 is is something that is very commonly used in computing. And
10 it's just a number, it's like a serial number, but it has a
11 very specific format that when you look at it, you recognize
12 it.

13 Q. Have you had training in computer science?

14 A. I have.

15 Q. Are you familiar with the term hexadecimal?

16 A. I am.

17 Q. Can you spell that for the court reporter?

18 A. Hexadecimal is spelled H-E-X-I-D-E-C-I-M-A-L.

19 Q. And what does hexadecimal mean?

20 A. So our counting system has base ten, we count one through
21 ten. For computers, because of the way they're built and how
22 they work, it's easier for them to count using a base 16.
23 Hexadecimal is a counting system that uses base 16, and it's
24 just like our counting system, it starts at zero and goes up to
25 nine, but then for ten through 16, it uses letters. So to

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1 count in hexadecimal you go start at zero and go to nine, and
2 the next would be A, B, C, D, E, and F and it stops at F.

3 MS. GRISWOLD: I would like to pass up to witness what
4 is marked for identification as Government Exhibit 3550, 3551
5 and 3552, and the Court as well.

6 Also passing up what is marked for identification as
7 Government Exhibit 34, which is a stipulation between the
8 parties. With the Court's permission I would like to read
9 Government Exhibit 34.

10 THE COURT: Are you offering it?

11 MS. GRISWOLD: Yes, your Honor.

12 THE COURT: Is there any objection to Government
13 Exhibit 34?

14 MR. JACKSON: No objection at all.

15 THE COURT: Government Exhibit 34 is received.

16 (Government's Exhibit 34 received in evidence).

17 THE COURT: And you may read it.

18 MS. GRISWOLD: Thank you.

19 At this point I'm going to read paragraphs four and
20 five of Government Exhibit 34.

21 THE COURT: Do you want them displayed to the jury?

22 MS. GRISWOLD: Yes, please, your Honor.

23 Paragraph four. On November 30, 2017, at the request
24 of the government, Omar Amanat's attorneys logged onto a Yahoo
25 web mail account belonging to Mr. Amanat and produced copies of

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1 the underlying emails with header information related to Amanat
2 Exhibits 908, 9010 and 9013 to the government.

3 Paragraph five. Government Exhibits 3550, 3551, and
4 3552 are copies of the underlying emails with header
5 information related to Amanat Exhibits 908, 9010 and 9013.

6 At this time the government would offer Government
7 Exhibits 3550, 3551 and 3552.

8 MR. JACKSON: No objection.

9 THE COURT: 3550, 3551 and 3552 are received in
10 evidence.

11 (Government's Exhibits 3550, 3551 and 3552 received in
12 evidence)

13 BY MS. GRISWOLD:

14 Q. You have those documents in front of you, Special Agent
15 DeCapua?

16 A. I do.

17 Q. Let's start with Government Exhibit 3550.

18 MS. GRISWOLD: Permission to publish that, your Honor?

19 THE COURT: Yes.

20 MS. GRISWOLD: And can we please put this up side by
21 side with Amanat Exhibit 908, which is in evidence, in redacted
22 form.

23 Q. Do both of these emails appear to be emails dated March 10,
24 2009?

25 A. Yes.

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1 Q. And are they the same subject line?

2 A. So one of them is the reply.

3 Q. They both say audit of Enable Invest Ltd?

4 A. Yes.

5 MR. JACKSON: Excuse me, your Honor, may I ask the
6 Court to ask the government to briefly read the portion of our
7 stipulation that relates to redactions?

8 THE COURT: Yes, that might be appropriate,
9 Ms. Griswold.

10 MS. GRISWOLD: Yes, your Honor. I believe the portion
11 of the stipulation that Mr. Jackson is referring to is in
12 paragraph one.

13 THE COURT: Yes, is that what you wish read at this
14 point, Mr. Jackson?

15 MR. JACKSON: Yes, your Honor, thank you.

16 THE COURT: All right.

17 MS. GRISWOLD: On the morning of November 7, 2017,
18 Omar Amanat's attorneys first produced copies of emails that
19 were ultimately admitted into evidence at trial in redacted
20 form as Amanat Exhibits 908, 9002, 9010, and 9013. These
21 documents were redacted before being offered at the request of
22 the government.

23 MR. JACKSON: Thank you very much.

24 MS. GRISWOLD: If we could put back up Government
25 Exhibit 3550 next to Amanat Exhibit 908.

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1 BY MS. GRISWOLD:

2 Q. So the 3550, this has header information for this email?

3 A. That's correct.

4 Q. And it includes more email content than is reflected in
5 Amanat Exhibit 908?

6 A. Yes.

7 Q. But it does include the email content in the redacted
8 Amanat Exhibit 908, correct?

9 A. Yes. Yeah, there's things missing from the content in 908.

10 Q. So focusing on 3550, which is the email produced by the
11 defendant with the header information, did you take a closer
12 look at the header information for this March 10, 2009
13 document?

14 A. I did.

15 Q. I want to direct you in particular to the message ID.

16 MS. GRISWOLD: If we could highlight that at the top.

17 Q. Did you take a closer look in particular at the message ID?

18 A. I did.

19 Q. What did you look at and what did you find?

20 A. So I was asked to look at this email and try to determine
21 whether or not it was authentic. And of course, as I said, an
22 email header could have some very useful things that help make
23 that determination. And looking at this header there wasn't a
24 lot of information, so I zoomed in on the message ID, because I
25 know that sometimes a message ID can have, for instance, a

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1 timestamp.

2 Looking at the message ID, it looks just like a random
3 number, but there's way to make sense of these numbers and try
4 to figure out what they mean. And so what I did is first I
5 looked, and this message ID is from a Blackberry, so when you
6 send an email from a Blackberry, Blackberry tags this message
7 ID on to the email. And I looked for more examples of
8 Blackberry message IDs then and they looked just like this.

9 Q. Are when you said you were looking for examples, were you
10 provided access to a set of emails?

11 A. I was. So first I looked online and I saw they were all
12 consistent, and I wanted to make sure they were consistent
13 around this exact time period, March 2009, because I know
14 sometimes you can -- a company can change the format of its
15 message ID. And I knew that the government had in its
16 possession some emails that were recovered from a guy named
17 Stephen Maiden's computer, and I knew that he was going to have
18 emails from Omar Amanat.

19 So I went to that computer and I sorted the messages
20 by sender, and I exported every single message from Omar
21 Amanat. And then when I got to to my office I looked all the
22 headers and carved out the ones sent from Omar Amanat with a
23 Blackberry, and I just compared all the message IDs in a line,
24 there were hundreds of them, and I noticed a pattern in those
25 message IDs.

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1 MS. GRISWOLD: I would like to show the witness what
2 is marked for identification as Government Exhibit 3579A, and
3 the Court.

4 Q. Do you recognize what is marked as Government
5 Exhibit 3779A?

6 A. I do.

7 Q. How do you recognize it?

8 A. This is something I created.

9 Q. Is it a chart that you created based on your review of
10 message IDs from Omar Amanat Blackberry from Maiden's computer?

11 A. That's correct.

12 Q. Is it accurate?

13 A. Yes.

14 MS. GRISWOLD: The government offers Government
15 Exhibit 3579A.

16 MR. JACKSON: No objection, Judge.

17 THE COURT: 3579A is received.

18 (Government's Exhibit 3579A received in evidence)

19 MS. GRISWOLD: Permission to publish?

20 THE COURT: Yes.

21 Q. So this chart is entitled select emails present on Stephen
22 Maiden's computer around March 10, 2009, sent from Omar Amanat
23 with a Blackberry message ID. Is that an accurate title for
24 the content?

25 A. It is.

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1 Q. And this chart has less than several hundred emails. Does
2 this include all of the emails that you reviewed from
3 Mr. Maiden's computer?

4 A. No, these are just the ones that were right around
5 immediately around the timestamp.

6 Q. Can you walk the jury through the columns in this chart and
7 what it is that they indicate?

8 A. So the first column is date and time sent. Now from the
9 header I just plucked the date, it's very clear cut, I just
10 copied and pasted it into this column for each email. The
11 sender, same thing, I just took the sender field from the
12 message header. In this case, every single one is Omar Amanat.

13 Then I took the message ID, again, from the message
14 header I just copied and pasted that field and populated this
15 column. And then we're jumping a little bit ahead of ourselves
16 here, but then there were two additional columns, one is for a
17 hidden timestamp that I found within the message ID, and the
18 next column is the conversion from epoch time, which is what
19 the hidden timestamp is in, into something that is human
20 readable.

21 MS. GRISWOLD: Could we highlight the very first row.

22 Q. And can you make sense of this row? This is an email that
23 you found on Mr. Maiden's computer?

24 A. Yes.

25 Q. And that you understand to be authentic?

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1 A. Yes.

2 Q. And can you walk through the comparison of the first
3 column, date time sent, with the last column, timestamp
4 conversion?

5 A. Absolutely. So as I was -- as I mentioned before, when I'm
6 looking at all the message IDs I noticed that pattern, and the
7 pattern is the second number in the message ID after the first
8 hyphen, it was incrementing as dates were going into the
9 future. So a really old message would have -- this number
10 would be lower and a newer message the message would be higher,
11 and I saw it was just incrementing.

12 And I immediately recognized it at this point, this a
13 timestamp, an epoch hidden timestamp within the message ID.
14 And because of that, I knew I could use that, it would have
15 some value as helping me figure out if the email here is
16 actually authentic. And so what I did is I started converting
17 the message IDs from epoch time, which again is just a number
18 which represents the number of seconds since January 1st, 1970,
19 into something that I could read and make sense of. On the far
20 right-hand side of the spreadsheet you could see the timestamp
21 and timestamp conversion, which is just me making that
22 conversion.

23 Then I recognized that -- I knew it was a timestamp, I
24 didn't know what it was a timestamp of. But once I made this
25 conversion I started looking at the sent date, and I saw that

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1 the timestamp conversion for every single email was within
2 seconds of the sent date. So therefore I concluded that this
3 hidden timestamp that's in the message ID is a reflection of
4 when the email was sent.

5 Q. For the hundreds of emails that you reviewed, putting aside
6 the exhibits that are in evidence in this case, did the date
7 time stamp line up when you did the timestamp conversion, did
8 they match?

9 A. Yes.

10 MS. GRISWOLD: If we could pull up the highlighted
11 row, please.

12 Q. Is this the message ID information that was pulled from
13 Government Exhibit 3550 that was provided by the defendant?

14 A. Yes.

15 Q. Can you walk us through what you noticed when you analyzed
16 this message ID?

17 A. So now that after reviewing the emails I found on Stephen
18 Maiden's computer, I knew what to expect, and so I compared it
19 to the emails that I was provided to determine the authenticity
20 of. And I saw that the message ID, the hidden timestamp within
21 the message ID, when I made the conversion it came to
22 July 23rd, 2009, which is not the date that the email was sent.

23 Q. Based on your review of this header information and all of
24 the other information on Mr. Maiden's computer that you've
25 testified about, are you able to offer an opinion as to whether

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1 or not this email, the Tuesday, March 10, 2009 email, is
2 authentic?

3 A. Yeah, it's a fake email.

4 Q. Are you confident in that opinion?

5 A. I am.

6 Q. Now besides this one example that's highlighted on the
7 screen, were you able to find any other examples in the
8 hundreds of Blackberry messages from Omar Amanat to Mr. Maiden
9 on his computer where the timestamp conversion did not match up
10 with the date and time sent?

11 A. No.

12 Q. Were you able to find any other examples besides this one?

13 A. Not from the ones on Stephen Maiden's computer.

14 MS. GRISWOLD: Let's turn to Government Exhibit 3552,
15 please, and if we could put that up side by side with Amanat
16 Exhibit 9002.

17 Q. From the stipulation that I read, Government Exhibit 3552
18 on the left is the December 2nd, 2008 email with the header
19 information as provided by the defendant?

20 A. That's correct.

21 Q. And did you take a closer look at the message ID in this
22 email?

23 A. I did.

24 Q. And what did you find?

25 A. So again, now that I knew there was a hidden timestamp in

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1 the message ID, I immediately zoomed in on it. And the first
2 thing I noticed is the message ID -- the hidden timestamp is
3 absurd, it's actually a date in the future, and I knew it
4 couldn't possibly be real.

5 Q. If we could go to what is marked for identification as
6 Government Exhibit 3579B.

7 Do you recognize Government Exhibit 3579B as another
8 chart you prepared for your testimony?

9 A. Yes.

10 Q. And is it accurate?

11 A. It is accurate.

12 Q. Does it relate to December 2nd, 2008 analysis?

13 A. It does.

14 MS. GRISWOLD: The government offers Government
15 Exhibit 3579B.

16 MR. JACKSON: No objection.

17 THE COURT: Government Exhibit 3579B is received.

18 (Government's Exhibit 3579B received in evidence)

19 BY MS. GRISWOLD:

20 Q. The title of this chart is select emails present on Stephen
21 Maiden's computer around December 2nd, 2008, sent from Omar
22 Amanat with a Blackberry message ID.

23 What does this chart reflect?

24 A. It reflects the same thing as -- the same information as
25 the previous chart, it is just comparing the December 2nd, 2008

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1 email provided by the defendant to all the other emails I found
2 on the Stephen Maiden computer.

3 Q. Around that time period?

4 A. Around that time period.

5 Q. Putting aside the highlighted ones, for all of the other
6 ones on the chart, did the date and time stamp time sent, the
7 first column, match up when you did the timestamp conversion?

8 A. Yes, within an approximation.

9 Q. What about the highlighted row, if we could blow that up,
10 what did you find when you looked at the hidden timestamp for
11 the Tuesday, December 2nd, 2008, header information?

12 A. As I said before, it indicates a date that's in the future.

13 Q. October 29, 2087?

14 A. Yes.

15 Q. Based on your review of this user ID -- sorry, message ID
16 information from the December 2nd, 2008 email reflected in
17 Amanat Exhibit 9002, are you able to offer an opinion as to
18 whether or not this email is authentic?

19 A. Yes.

20 MR. JACKSON: Objection.

21 THE COURT: Grounds?

22 MR. JACKSON: Goes beyond the scope of what he's
23 testifying to.

24 THE COURT: I'll hear you at sidebar.

25 Ladies and gentlemen, we'll take a brief recess.

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1 Don't discuss the case, we'll get back to you shortly.

2 (At sidebar)

3 THE COURT: So I didn't understand how this was
4 different than his previous question.

5 MR. JACKSON: Your Honor, frankly, I anticipated the
6 first question would come in slightly differently, and I should
7 have objected at that time. But I do think that this -- I
8 understand that the question was posed at the hearing, and I
9 understand for the purposes of hearing that type of sort of
10 blunt questioning could be potentially useful to the Court. I
11 didn't think that the government would ask a question that went
12 that far in terms of the conclusion that Special Agent DeCapua
13 is able to offer. And I think that the conclusion that he's
14 able to offer really is that the message ID on here he does not
15 believe is authentic. He can't testify that the message in its
16 entirety is inauthentic. There's no basis for that.

17 MS. GRISWOLD: I think he can, I think it can be two
18 questions if you want, but I think what he would say is this
19 message ID is fake, and when you have a fake message ID, in his
20 opinion -- and he's set forth his qualifications, his opinion
21 is that that means that the email is fake.

22 MR. JACKSON: But there's no scientific basis for
23 that, it's entirely possible --

24 THE COURT: I guess it turns into the question of what
25 do you mean by "fake." So what we mean by that, I think, is

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1 that the message was not sent at the time and date indicated.
2 Maybe that's a better way to -- maybe that's more precise.

3 MR. NAFTALIS: Your Honor, one of the issues is there
4 is no evidence it was ever even sent, so I don't want to leave
5 the misimpression. The point is it was fabricated, and the
6 point it is that it was never moved between computers.

7 MR. JACKSON: But what the Court just said encompassed
8 what you said. The fact that it was not sent at the time and
9 date it purports to have been sent encompasses --

10 MR. NAFTALIS: That assumes it was ever sent though.

11 MR. JACKSON: It does not, it doesn't assume that, and
12 that's really what his opinion goes to scientifically.

13 THE COURT: I think it's implicit, because according
14 to agent's chart, it was sent in 2087.

15 MR. NAFTALIS: Maybe I'm being too sensitive to it,
16 but the whole point is that we're -- the jury doesn't know that
17 you can upload -- we haven't completed the whole steps. We
18 would contest that this email even moved between two computers,
19 so to limit his testimony to it was sent leaves the impression
20 for Mr. Jackson to argue maybe there was computer error when it
21 moving between the computers. And the point is it was
22 fabricated and never actually moved. It's an impossibility.

23 MS. GRISWOLD: The jury heard the term "authenticity"
24 throughout the trial, and I think here, if you don't want me to
25 say is it fake, I think it would be accurate to say based on

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1 this message ID, can you offer an opinion to whether or not
2 this email is authentic.

3 MR. JACKSON: Again, I think it's enormous --
4 authentic does not actually answer the question, it goes
5 beyond -- there's a whole bunch of things that are encompassed
6 in that that goes beyond the scope of what he can actually
7 testify to.

8 MS. GRISWOLD: It was fabricated. He would say that
9 message ID was typed in and everything was changed because it's
10 not possible.

11 MR. JACKSON: He could say -- I think he could offer
12 that testimony and say my opinion is that this message ID was
13 fabricated. I think that everything beyond that is beyond the
14 scope of his expertise.

15 THE COURT: The other piece of it would be the email
16 was not sent at the time and date indicated. He could
17 certainly testify to that.

18 MR. WILLIAMS: Can she clarify whether or not he could
19 conclude that the email was ever sent to clear up any potential
20 implicit suggestion that the message ID was inaccurate but it
21 may have been sent earlier in time?

22 THE COURT: Can he testify that the message was never
23 sent?

24 MS. GRISWOLD: That particular message -- I am happy
25 to confer with him, but I believe, yes, he's saying that

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DeCapua - Direct

1 message ID is a message ID that doesn't make sense that tells
2 him that the email itself was a fabricated email. When you say
3 "that message," I think he could testify that that specific
4 message was never sent.

5 THE COURT: I don't see how he could testify it was
6 never sent, because theoretically it could have been sent,
7 right?

8 MS. GRISWOLD: It could have been sent.

9 THE COURT: This particular communication was not
10 sent. He couldn't testify that the content of that email was
11 not sent.

12 MS. GRISWOLD: Was never sent?

13 THE COURT: Yeah, who knows? That's not a question
14 that he sought to answer, let's put it that way.

15 MR. WILLIAMS: Which is why I suggested the question:
16 Can you conclude, based on this message ID, whether or not this
17 email was ever sent? And presumably he would say no, I cannot
18 make that conclusion.

19 MS. GRISWOLD: How about to offer an opinion that the
20 message ID was fabricated and that this particular email was
21 not sent on December 2nd, 2008?

22 MR. JACKSON: I'm good with that. That's acceptable.

23 THE COURT: And I think that's clear.

24 MR. JACKSON: Your Honor, I want to -- related to
25 that, I would personally like to ask that -- can we clarify the

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1 record on his prior answer with regard to saying that it's
2 fake? I think that that exact same language is what really
3 should be limited in his opinion in regard to both
4 communications.

5 MS. GRISWOLD: I think you could elicit that on cross.
6 There was no objection and I think there was foundation for it.

7 THE COURT: I don't think we can go back to that, but
8 you're welcome to cross-examine on that.

9 MR. JACKSON: Thank you, Judge.

10 THE COURT: We'll take a brief recess.

11 (Recess taken)

12 THE COURT: Agent DeCapua can retake the stand.
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1 (Jury present)

2 THE COURT: You may proceed.

3 MS. GRISWOLD: Thank you, your Honor.

4 If we could please put up Government Exhibit 3579B.

5 BY MS. GRISWOLD:

6 Q. Before the break, Special Agent DeCapua, we were talking
7 about the message ID that you identified for the Tuesday,
8 December 2nd, 2008 email that is in evidence in redacted form
9 as Amanat Exhibit 902. I want to go back to your testimony
10 about what opinions you're able to offer concerning your
11 analysis.

12 First, let me ask you, are you able to offer an
13 opinion as to whether or not this message ID for this email was
14 fabricated?

15 A. Yes.

16 Q. And what is that opinion?

17 A. It's fake.

18 MS. GRISWOLD: Let's put up Amanat Exhibit 9002. If
19 we could highlight the date, please.

20 Q. Based on your testimony that the message ID is fake, are
21 you able to offer an opinion as to whether or not this email
22 was sent on Tuesday, December 2nd, 2008?

23 A. Yes.

24 Q. What's that opinion?

25 A. It wasn't sent.

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1 Q. And I assume your opinion -- well, let me ask, what's your
2 opinion as to whether or not it was sent in 2087?

3 A. It definitely was not sent in 2087.

4 Q. You testified earlier about your training and
5 investigations analyzing email headers in the context of
6 determining if emails were spoofed. Do you recall that
7 testimony?

8 A. I do.

9 (Continued on next page)

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DeCapua - Direct

1 BY MS. GRISWOLD:

2 Q. In that analysis, is the Message-ID a focus of your
3 analysis?

4 A. It is.

5 Q. Why?

6 A. So when you're trying to determine whether an email is
7 faked or spoofed or fraudulent, as I mentioned before, you look
8 to the header, and there's certain things in the header that
9 you focus in on. And as I mentioned before, you focus in on
10 the Message-ID, and one of the gold standards for determining,
11 determining that an email is fake is you find two emails in an
12 account with the same Message-ID. Message-IDs are always
13 unique. They're always unique. If you find two with the same
14 Message-ID, you know one of them is fake.

15 When you're spoofing an email or when you're trying to
16 create a fake email, you go into the header and you change
17 things in the header, and people know that a Message-ID can't
18 be the same.

19 MR. JACKSON: Objection.

20 THE COURT: Sustained.

21 BY MR. JACKSON:

22 Q. So a Message-ID is important to your analysis whether or
23 not an email has been fabricated?

24 A. Yes, it's common for a Message-ID to be changed by someone
25 fabricating an email because they don't want it to match the --

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1 MR. JACKSON: Objection.

2 THE COURT: Sustained.

3 You can't testify as to what goes on in someone else's
4 mind, so whenever you lapse into topics of what someone else is
5 thinking, there's going to be an objection and it's going to be
6 sustained.

7 THE WITNESS: I apologize.

8 BY MR. JACKSON:

9 Q. In the course of your analysis of Message-IDs to determine
10 whether or not emails have been fabricated, have you identified
11 situations where the Message-ID has been changed?

12 A. Yes.

13 Q. Let's go to Government Exhibit 3551, the third email that
14 you were asked to analyze.

15 MS. GRISWOLD: Put it up on the screen, please, and
16 put it side by side with Amanat Exhibit 9013.

17 Q. On the left-hand side, Government Exhibit 3551, is this the
18 header information that you were provided for this March 26,
19 2012, exhibit?

20 A. Yes, it is.

21 Q. And based on the stipulation that we read, this is the
22 header information provided by the defendant for this email?

23 A. That's correct.

24 Q. I want to direct your attention to the Message-ID.

25 MS. GRISWOLD: Could I ask Ms. Pyun to highlight it.

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DeCapua - Direct

1 Q. Did you investigate this Message-ID?

2 A. I did.

3 Q. What, if anything, struck you about it?

4 A. No. 1, it was created most likely with an Apple Mail
5 client, which is on an iPhone; it's on Apple computers. And I
6 just identified the Message-ID as being the format that Apple
7 Mail uses.

8 The other thing that struck me is you can break this
9 Message-ID into two parts and you can break it up using the
10 "at" symbol that's right before Amanat Capital. So what's
11 interesting is everything before the "at" symbol. It looks
12 like a random jumble of numbers and letters, but that format is
13 something very significant in computer science. This is a
14 UUID, which I defined earlier. It stands for a universal
15 unique identifier, and they all have the same format. There's
16 going to be eight characters, a hyphen, four characters, a
17 hyphen, four more characters, a hyphen, four more characters, a
18 hyphen, and then 12 characters. And this is something found
19 throughout computer science on all different platforms. It's
20 also known as a GUID, which stands for globally unique
21 identifier, and I know that a GUID or a UUID is in something
22 called hexadecimal, which I defined earlier.

23 Q. Can you just remind the jury what hexadecimal is?

24 A. Hexadecimal is the way that computers count, and it allows
25 for the digits zero through 9 and the letters A through F.

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DeCapua - Direct

1 Nothing else.

2 THE COURT: Could you go back and explain how it is
3 that you were able to determine that this was created on an
4 Apple Mail client?

5 THE WITNESS: Sure. So, there's resources that I
6 looked at where it will say this is a pattern of the Message-ID
7 for this specific client or this is a pattern for Message-ID
8 for this specific client, and this specific pattern for a
9 Message-ID is associated with Apple Mail clients. And also, I
10 tested that, and I've looked at emails that I know have been
11 sent from Apple Mail, including ones I've sent myself, ones
12 that have been sent from other people's pages in the regular
13 course of business, and they fit this pattern, every single one
14 of them.

15 THE COURT: When you say this pattern, could you
16 identify what you see on this exhibit, Government Exhibit 3551,
17 where on it is the pattern that you're talking about that
18 indicates it's Apple?

19 THE WITNESS: The pattern is the UUID, which is
20 everything before the "at" symbol and then the "at" symbol and
21 then everything after the "at" symbol, which is a domain name.

22 THE COURT: All right. Go ahead, Ms. Griswold.

23 BY MR. JACKSON:

24 Q. And you testified that you looked at some other emails to
25 make sure that you were correct that this was an Apple Mail, is

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DeCapua - Direct

1 that correct?

2 A. I did.

3 Q. Was that limited to messages from this case, or did you
4 take a broader universe?

5 A. I took a very broad universe to include emails from -- sent
6 to me in the regular course of business, to emails that I
7 created myself using one of the accounts that I set up and
8 other emails in my possession where I would just quickly run
9 through and confirm that an Apple Mail client always has this
10 type of UUID.

11 Q. So you testified that the hexadecimal can only have zero
12 through 9 or A through F. Do I have that right?

13 A. That's correct.

14 Q. And in this case, what did you notice about this Message-ID
15 that struck you, based on those parameters?

16 A. I noticed that in the, in the fifth set of numbers after
17 the fourth hyphen, it does not conform to a standard for UUID,
18 which I would expect it all to be hexadecimal. There's two
19 characters, they're V's, which there's no reason a V should be
20 there, in a hexadecimal number.

21 Q. Based on your review of this Message-ID and your
22 familiarity with hexadecimal characters, are you able to offer
23 an opinion as to whether or not this Message-ID was fabricated?

24 A. Yes. It's fake.

25 MS. GRISWOLD: If we could zoom out and show the

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1 entire exhibit, Amanat Exhibit 9013.

2 Q. Based on your testimony that the user ID is fake, are you
3 able to offer an opinion whether or not --

4 THE COURT: It's the Message-ID that's fake, right?

5 MS. GRISWOLD: Yes, your Honor. If I said something
6 else, I misspoke.

7 THE COURT: I heard you to say user ID.

8 MS. GRISWOLD: Oh, I misspoke.

9 THE COURT: Yes. Could you reask the question,
10 please.

11 MS. GRISWOLD: Certainly.

12 Q. Based on your testimony that the Message-ID for this email
13 was fake, are you able to offer an opinion as to whether or not
14 this email was sent on Monday, March 26, 2012?

15 A. It was not.

16 MS. GRISWOLD: If we could put up on the screen Amanat
17 Exhibit 910 -- 9010. Thank you, Mr. Urbanczyk.

18 Q. Special Agent DeCapua, were you provided with any header
19 information for this email?

20 A. No.

21 Q. So you were unable to do the analysis you did on the other
22 emails?

23 A. That's right.

24 MR. JACKSON: And if we could bring up on one screen
25 Amanat Exhibits 908, 9002 and 9013.

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DeCapua - Direct

1 Q. Starting with 908, what is your opinion as to whether or
2 not this email was sent on Tuesday, March 10, 2009?

3 A. No.

4 MR. JACKSON: Objection, your Honor. Asked and
5 answered.

6 THE COURT: Overruled.

7 This is a wrap-up, I take it.

8 MS. GRISWOLD: It is, your Honor.

9 THE COURT: Yes. It's overruled.

10 BY MR. JACKSON:

11 Q. What was your answer?

12 A. It's a fake email.

13 MR. JACKSON: Objection.

14 THE COURT: The question was, Agent, whether Amanat
15 Exhibit 908, you could offer an opinion as to whether or not
16 that email was sent on Tuesday, March 10, 2009. That was the
17 question.

18 THE WITNESS: It was not sent.

19 MS. GRISWOLD: If we could zoom up on 9013.

20 Q. Are you able to offer an opinion as to whether that was
21 sent on Monday, March 26, 2012.

22 A. It was not sent.

23 Q. And finally, Amanat Exhibit 9002, are you able to offer an
24 opinion as to whether this email was sent on Tuesday, December
25 2, 2008, at 11:07 p.m.?

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DeCapua - Cross

1 A. It was not sent.

2 MS. GRISWOLD: No further questions, your Honor.

3 THE COURT: All right. Cross-examination.

4 CROSS-EXAMINATION

5 BY MR. JACKSON:

6 Q. Good afternoon, Special Agent DeCapua.

7 A. Good afternoon.

8 Q. Special Agent DeCapua, I know you're a very accomplished
9 federal agent. I want to ask you a few questions about your
10 training specifically related to the issues you've testified
11 about.

12 I'd also like to ask, I'd like to respectfully ask, I'm
13 going to try to phrase all my questions, unless it's necessary
14 otherwise, in the format of yes or no. So I would ask if you
15 can answer it yes or no, please do so. If you can't, please
16 let me know if you can't answer yes or no.

17 A. OK.

18 Q. Thank you, Agent.

19 Now, I want to just start off by asking you, you
20 attended Indiana University, correct?

21 A. For my graduate degree, that's correct.

22 Q. Where did you get your bachelor's degree?

23 A. It was DePaul University.

24 Q. OK, so you went to DePaul for undergrad and then you went
25 to Indiana University for graduate school, correct?

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DeCapua - Cross

1 A. That's correct.

2 Q. In neither of those did you get a degree in computer
3 science, right?

4 A. I did not get a degree in computer science.

5 Q. In neither of those did you have a minor in computer
6 science?

7 A. I did not minor in computer science.

8 Q. In either your graduate or your undergraduate education,
9 did you take any classes on network engineering?

10 A. Not on network engineering.

11 Q. You've never taken classes that qualified you to be a
12 network engineer, correct?

13 A. Not in college or graduate studies.

14 Q. OK, well, you're not a network engineer, right?

15 A. Correct.

16 Q. And network engineer is a type of technology professional
17 who has a specific technological understanding necessary to
18 construct and analyze the networks that are utilized for email
19 systems, correct?

20 A. Yes.

21 Q. Now, just to be clear, have you taken any formal classes on
22 engineering?

23 A. Yes.

24 Q. Now, one of the things that you talked about earlier was
25 some of your professional experience, right?

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DeCapua - Cross

1 A. Yes.

2 Q. You've never worked at Blackberry, correct?

3 A. Correct.

4 Q. You've never worked at Apple, correct?

5 A. That's correct.

6 Q. You've never worked at Microsoft?

7 A. Correct.

8 Q. You've never worked at any of the companies that actually
9 build the computer infrastructure that you've been testifying
10 about today, right?

11 A. That's correct.

12 Q. What did you do before you were a federal agent?

13 A. I was an investigator for the state of Indiana.

14 Q. Doing what type of investigations?

15 A. It was primarily securities fraud, financial fraud, money
16 laundering.

17 Q. OK. And so after that, you came to the FBI, in 2009,
18 right?

19 A. That's correct.

20 Q. And for the first several years that you were at the FBI,
21 you weren't focused on the cyber squad that you're a part of
22 now, right?

23 A. That's right.

24 Q. You didn't transfer to that until 2015, right?

25 MS. GRISWOLD: Objection.

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DeCapua - Cross

1 THE COURT: Sustained.

2 Q. 2014?

3 A. That's correct.

4 Q. And so in 2014, you began to focus with particularity on
5 some of the types of cyber issues that have been your recent
6 focus, right?

7 A. So, I can't answer that in yes or no.

8 Q. That's fine. That's fine. I'll come back to that. Let me
9 get more information. The point being 2014 is when you joined
10 the cyber squad?

11 A. That's right.

12 Q. You've been doing that work for the past three years?

13 A. Yes.

14 Q. And I'm correct that that's when you started taking the
15 classes that we saw on your résumé from GIAC, right?

16 A. That's correct.

17 Q. Now, GIAC is not a governmental agency, correct?

18 A. Correct.

19 Q. GIAC is a, it's a nonprofit organization, right?

20 A. I believe so, yes.

21 Q. And just to be clear, and I have a couple of questions
22 about GIAC, but you've never held an appointment as professor
23 in network engineering or any other type of computer science at
24 any university, have you?

25 A. No.

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DeCapua - Cross

1 Q. And you've never been published in any journal related to
2 computer sciences, right?

3 A. No.

4 Q. You've never been published in any journal related to
5 network engineering, correct?

6 A. No.

7 Q. You've never been published in any journal that relates to
8 the architecture of email systems, right?

9 A. No.

10 Q. And just going back to GIAC, GIAC has been the heart of
11 your formal training on these issues, right?

12 A. That's correct.

13 Q. The total amount of time that you have spent in formal
14 training in GIAC is about two weeks, am I correct?

15 A. You are incorrect.

16 Q. I'm incorrect?

17 A. That's right.

18 Q. OK. What is the total amount of time that you've spent in
19 formal training in GIAC?

20 THE COURT: Could we find out what you mean by formal
21 training?

22 MR. JACKSON: Yes, your Honor.

23 THE COURT: Do you mean training at GIAC, or do you
24 mean something else?

25 MR. JACKSON: I mean training at GIAC.

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DeCapua - Cross

1 Q. Let me ask you. What is the total amount of time that
2 you've spent in courses at GIAC?

3 A. So, just -- quickly, just to differentiate for the record,
4 GIAC is the certifying body. They don't put on courses. The
5 body that puts on courses is something called SANS, and the
6 total amount of time that I sat in a class, probably six weeks.

7 Q. OK. So you've sat in classes for SANS for about six weeks
8 for your GIAC certifications?

9 A. Thereabout.

10 Q. And you have several different GIAC certifications that we
11 went through?

12 A. That's correct.

13 Q. Now, to pass a GIAC course, you only have to take one
14 class, right, one test?

15 A. Yes.

16 Q. And you have to get 69 percent or better on that test,
17 right?

18 A. So, each exam has a different threshold. I believe the 69
19 percent is for the really difficult -- it's a networking exam,
20 which I passed. Most of them are closer to like the 70 to 80
21 percent threshold.

22 Q. OK. You don't know specifically what the threshold was for
23 each one of the GIAC certifications in your résumé, right?

24 A. Not right now, no.

25 Q. OK, but it's your testimony that generally it hovers

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DeCapua - Cross

1 somewhere between 69 percent and about 80 percent, is that
2 right?

3 A. Yes.

4 Q. And to be clear, there are different levels of GIAC
5 certifications, right?

6 A. Correct.

7 Q. There's a beginner level?

8 A. Yes.

9 Q. And then there are two intermediate levels. One is called
10 intermediate and one is called advanced, right?

11 A. So -- I don't know. I don't know what you're talking
12 about.

13 Q. OK. There's an intermediate level, right, in GIAC?

14 A. There are intermediate-level courses. There's one course
15 that is definitely the beginner level, which I actually did not
16 take, and then there are the intermediate level and then the
17 advanced courses.

18 Q. And then there's a level above the advanced that's called
19 expert courses, right?

20 A. So, there's not an expert course. There's an expert
21 certification. The GFE is what I believe you're referring to.

22 Q. Have you seen the GIAC road map for certification that is
23 listed on the GIAC website?

24 A. I have.

25 Q. And you're aware that it identifies that there's an expert

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DeCapua - Cross

1 level, right?

2 A. Yes. It's just a test. It's actually not a class.

3 Q. Right. And the certification is called GIAC security
4 expert, right?

5 A. That's correct.

6 Q. That's a certification that you don't have?

7 A. It's a certification I don't have currently.

8 Q. OK. Now, the fact of the matter is you were describing in
9 your direct examination some of your work with email headers,
10 correct?

11 A. That's correct.

12 Q. And am I correct that, just going back earlier to one of
13 the things that you talked about with the judge --

14 MR. JACKSON: Can we focus on 3579-B.

15 Q. And this is one of the documents that you created for this,
16 right?

17 A. Correct.

18 Q. For your testimony?

19 A. Correct.

20 Q. And there is a time stamp here. There's a column for the
21 time stamp, correct?

22 A. That's right.

23 Q. With the exception of December 2, 2008, email that's
24 highlighted, all of the other emails you got off Mr. Maiden's
25 computer, right?

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DeCapua - Cross

1 A. Yes.

2 Q. And when you took a look at those, you said you took a look
3 at hundreds of them, right?

4 A. That's correct.

5 Q. How many exactly did you take a look at?

6 A. So, I don't know the exact number. I had them all in a
7 gigantic test file, and then I automated the process of looking
8 through them all, and I didn't count the exact number.

9 Q. OK. Did you take notes as you were doing this process?

10 A. No.

11 Q. OK.

12 A. Other than populating this.

13 Q. But you put all of those in a gigantic text file, the
14 hundreds you were looking at?

15 A. Correct.

16 THE COURT: And these were all Blackberry messages,
17 right?

18 THE WITNESS: Yes.

19 Q. What did you do with that text file?

20 A. So, I ran some scripts on it just to quickly parse out the
21 information I'm interested in, particularly the part that is
22 the hidden time stamp, so then I put that all in another column
23 without having to type them in all by hand.

24 Q. I guess my question specifically was, did you save that
25 text file?

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DeCapua - Cross

1 A. I would assume so, but I'm not 100 percent sure if I did.

2 Q. OK. Did you save the scripts that you ran in connection
3 with the text file?

4 A. No.

5 Q. OK. So you ran the scripts; did you write down what you
6 saw when you ran the scripts?

7 THE COURT: Could you explain what you mean by
8 scripts?

9 THE WITNESS: So, there's some built-in scripting
10 programs in Linux, which is the computer I was -- it's a type
11 of operating system that I was using to do this analysis
12 because you can quickly parse through large text files, and by
13 large I mean humongous. These were, just to open the text
14 file, it would crash the computer, so I needed a way to
15 systematically quickly parse through it, and Linux has some
16 built-in tools that you can use to script. And by script, I
17 just mean it's an automated process that takes the manual work
18 out of things, and so I can write a script that says, Using the
19 tool built into Linux to ingest every single one of these
20 Message-IDs and throw out everything other than the hidden time
21 stamp number that I'm interested in, and then that script will
22 say take that hidden time stamp number and create a new text
23 file where all these hidden time stamps are just there, and
24 then I can take them and copy and paste them into a column.

25 THE COURT: I see.

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DeCapua - Cross

1 BY MR. JACKSON:

2 Q. Now, one of the things you said is that when you ran these
3 scripts, I think your direct testimony was they all came close
4 to the sent time, and I think your words were "within an
5 approximation"?

6 A. That's correct.

7 Q. When you say within an approximation, how big was the gap
8 that you saw in the messages that are not on your sheet from
9 the sent time that was listed in the email?

10 A. So, after -- I didn't look through every single one, but
11 after taking a sampling, I saw that it was consistently a few
12 seconds to maybe like a minute or two, at most, different from
13 the actual sent time of the email.

14 Q. I'm confused, because you said, I thought, in your direct
15 testimony, that you went through hundreds of these and saw that
16 the sent time consistently matched up with what you described
17 as the time stamp. Right?

18 A. Right. So I would eyeball it. I would scroll through and
19 say, all right, these all say March 3, and these are March 3,
20 I'm going through, and I'm not looking at each second, you
21 know, time stamp for every single one.

22 Q. So you didn't actually test out for all these hundreds that
23 you went through, you didn't actually test out whether or not
24 the time in the time stamp that you found matched up with the
25 sent time?

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DeCapua - Cross

1 MS. GRISWOLD: Objection to form. Test out.

2 THE COURT: Sustained.

3 Q. You didn't actually make a determination for each one of
4 the specific emails that you looked at whether the time stamp
5 matched up with the sent time?

6 THE COURT: That's confusing. You mean the ones on
7 the chart or all the ones he looked at?

8 MR. JACKSON: I'm talking about all of the emails that
9 he looked at, your Honor.

10 A. All the emails I looked at, I -- to my satisfaction, I was
11 happy that the time stamp reflected the date the email was
12 sent.

13 Q. OK. Let's put aside satisfaction. My question is, did you
14 actually run the number that you found, what you believe is the
15 hidden time stamp in order to convert it into a time that is
16 human readable for all of these hundreds of messages?

17 A. Yes.

18 Q. So you actually ran the conversion?

19 A. Yes.

20 Q. Did you preserve that anywhere?

21 A. I don't think so. I don't know.

22 Q. You're not sure?

23 A. I'm not sure.

24 Q. OK. You knew that you were doing this in anticipation of
25 testifying in court, right?

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DeCapua - Cross

1 A. Well, that's why I built this spreadsheet.

2 Q. I see, but I'm talking about what's not on the spreadsheet.
3 You knew that that was all in anticipation of your testifying
4 in court, correct?

5 A. Correct.

6 Q. And so you ran hundreds of bits of analysis, and you're
7 telling me that you didn't take any notes?

8 THE COURT: Sustained.

9 Q. OK. You didn't preserve what you ran in any way?

10 MS. GRISWOLD: Objection. May we have a sidebar?

11 MR. JACKSON: Your Honor, I'm going to move on to
12 another topic. We can talk about it on a break.

13 THE COURT: All right.

14 BY MR. JACKSON:

15 Q. Now, one of the things you also have said --

16 MR. JACKSON: Can you get, I don't know the exhibit
17 number, the third --

18 Q. By the way, you first came up with this two nights ago,
19 right?

20 A. That's correct.

21 Q. So before two nights ago, you had never come up with this
22 theory before?

23 MS. GRISWOLD: Objection. Form. This theory.

24 THE COURT: Sustained.

25 Q. All of the analysis we're talking about, right, you came up

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DeCapua - Cross

1 with two nights ago?

2 MS. GRISWOLD: Objection.

3 THE COURT: Grounds.

4 MS. GRISWOLD: Form and as to what he means by this
5 analysis. It's too vague.

6 THE COURT: Can you rephrase your question?

7 MR. JACKSON: Yes, Judge.

8 Q. During your direct testimony, Special Agent DeCapua, you
9 described your realization that there was a hidden time stamp
10 within certain Blackberry messages, correct?

11 A. That's correct.

12 Q. You came to that conclusion two nights ago, right?

13 A. That's correct.

14 Q. And before that, you had never done any analysis where you
15 determined that there was a purported hidden time stamp in the
16 Blackberry system, right?

17 A. That's right.

18 Q. And to be clear, you've never conferred with anyone at
19 Blackberry to verify your theory, right?

20 A. That's correct.

21 Q. And so no one on your cyber squad had ever heard of this
22 theory before, correct?

23 THE COURT: What theory?

24 MR. JACKSON: Withdrawn, your Honor.

25 Q. You're not aware of any literature anywhere that describes

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DeCapua - Cross

1 the hidden time stamp that you're talking about that you see in
2 these messages, correct?

3 A. So, there is literature that describes that time stamps are
4 sometimes embedded in Message-IDs.

5 Q. But you're not aware of any literature that describes the
6 specific hidden time stamp that you've been talking about,
7 right?

8 THE COURT: I don't understand the question.

9 Q. Well, you've been talking about a hidden time stamp that
10 you've been using in these Blackberry messages, right?

11 A. Correct.

12 Q. You're not aware of anywhere that it's documented that that
13 hidden time stamp appears in Blackberry messages?

14 A. Correct. I found it.

15 Q. You found it on your own?

16 A. Yes.

17 Q. Now, one of the things that you know, and I think you
18 testified on direct, is that companies can alter the way that
19 Message-IDs are created within their computer systems, right?

20 A. That's correct.

21 Q. That comes down to a coding decision, correct?

22 A. Yes.

23 Q. And there are numerous ways of creating a Message-ID,
24 right?

25 A. Correct.

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DeCapua - Cross

1 Q. From a computer standpoint, from a coding standpoint?

2 Well, just to be clear, you don't actually -- you're not a
3 person who has ever actually done the coding for the creation
4 of Message-IDs, right?

5 A. I have not.

6 Q. But you are aware that the coding connected to Message-IDs
7 can be utilized to create a unique Message-ID in a number of
8 different ways, right?

9 MS. GRISWOLD: Objection. Foundation.

10 THE COURT: Sustained.

11 Q. Now, the fact of the matter is one of the things that you
12 testified about on your direct examination was this concept of
13 a UUID?

14 A. That's correct.

15 Q. And I think your testimony -- first of all, your testimony
16 has been that a Message-ID has to be unique, right?

17 A. That's correct.

18 Q. That's not precisely correct, right?

19 A. I believe, according to the authoritative RFC that
20 addresses Message-IDs, the one thing it says a Message-ID must
21 be is unique.

22 Q. Right.

23 THE COURT: And when you say authoritative RFC, what
24 is it you're talking about? What's the RFC?

25 THE WITNESS: So when the Internet was developed,

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DeCapua - Cross

1 the -- it was a bunch of universities that were just exchanging
2 information, saying how should we make our computers talk to
3 each other, and the convention for sharing information and for
4 publishing it was something called an RFC, which stands for
5 request for comment.

6 Now, over time, the request-for-comments that have
7 been published by -- there's a nonprofit agency, I don't know
8 what the name of it, they have become the authoritative
9 guidebook for what specific protocols must have and what they
10 should have and generally how computers are supposed to talk
11 over a network. And so when developers are trying to figure
12 out how they should code their software, the most authoritative
13 place where they get the answers as what they must and should
14 have, they go to the RFC where things are published.

15 BY MR. JACKSON:

16 Q. Thank you. I'm glad we got to the creation of the
17 Internet, because you're aware of how UUIDs were developed,
18 right?

19 MS. GRISWOLD: Objection. Foundation.

20 MR. JACKSON: I'm asking a question. He's been
21 talking about his understanding of the history of the Internet.

22 THE COURT: The objection is overruled.

23 Are you aware how UUIDs were developed?

24 THE WITNESS: No.

25 BY MR. JACKSON:

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DeCapua - Cross

1 Q. Have you heard of the Apollo company?

2 A. No.

3 Q. You're not familiar with that at all?

4 A. No.

5 Q. Have you heard of Hewlett-Packard?

6 A. Yes.

7 Q. You know that Hewlett-Packard is one of the companies that
8 was involved in the early creation of UUIDs?

9 A. I have no idea.

10 Q. You're not familiar with that. OK.

11 Are you familiar with what is known as the Open Software
12 Foundation?

13 A. I've heard of it, yes.

14 Q. You've heard of it, right? That's the organization that
15 deals with standards for UUIDs, correct?

16 A. I don't know.

17 Q. You're not familiar with that?

18 A. No.

19 Q. OK. Have you ever looked into any of the standards
20 associated with UUIDs?

21 MS. GRISWOLD: Objection. Form.

22 THE COURT: Sustained.

23 Q. What is the source of your training on UUIDs?

24 A. Mostly it's in Windows Registry Forensics. A UUID is used
25 very frequently, and I don't -- I never got into the history of

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DeCapua - Cross

1 them or why they look the way they are, but they're one of
2 those things that when you see them you know them.

3 Q. Let's back up from that. What I'm trying to understand is
4 how is it that when you see a UUID, you know it? Where did you
5 learn that?

6 THE COURT: Let's start with, what do you mean by
7 Windows Registry Forensics? What is that, and what is the
8 relationship between that and your ability to identify UUIDs?

9 THE WITNESS: So, Windows keeps a database inside
10 their operating system that's called a registry, and inside the
11 registry has different things related to the operating system.
12 For instance, system mate is in the registry. And as a
13 database it has something called a key, which is a number that
14 represents each field in the database, and something that's
15 commonly used in the Windows registry to act as a key is a
16 UUID.

17 BY MR. JACKSON:

18 Q. OK. So I want to know, where did you learn about the
19 UUIDs?

20 A. From studying digital forensics.

21 Q. Is it something that you learned in your GIAC classes?

22 A. Yes, it was something that was discussed in GIAC classes,
23 not the history or formation, but the fact that this is a UUID.

24 Q. Right. To be clear, no one ever taught you in GIAC classes
25 that you could look at a UUID and determine definitively that

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DeCapua - Cross

1 it came from an Apple Mail client, right?

2 A. Correct.

3 Q. And in fact, you can't look at a UUID and determine
4 definitively that it came from an Apple Mail computer, can you?

5 A. You can't.

6 Q. Right. It's impossible because there are many different
7 ways a UUID can be created, right?

8 A. Yes.

9 Q. A software engineer can create, can design programming that
10 creates a UUID that has the same format as the one you looked
11 at that's not an Apple Mail UUID, right?

12 MS. GRISWOLD: Objection. Foundation.

13 THE COURT: Sustained.

14 Q. Now, your testimony was that all UUIDs are in hexadecimal,
15 correct?

16 A. Correct.

17 Q. And what is the source of your belief? Can you point us to
18 any authority that says that all UUIDs are hexadecimal?

19 MS. GRISWOLD: Objection to form.

20 THE COURT: Overruled.

21 A. Yes, there's lots --

22 THE COURT: I guess there are two questions there.

23 MR. JACKSON: Let me break it up, your Honor.

24 Q. What is the source of your understanding that all UUIDs are
25 in hexadecimal?

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DeCapua - Cross

1 A. So, first, it's just been through observation, and second,
2 it's been through research. I believe the Wikipedia posts for
3 hexadecimal says or the Wikipedia post for UUID says "is in
4 hexadecimal."

5 Q. You're relying on Wikipedia? That's your testimony?

6 MS. GRISWOLD: Objection.

7 THE COURT: His testimony was that he was relying on
8 his own observation and Wikipedia.

9 Q. OK, so your observations plus Wikipedia, right?

10 A. Plus other sources that don't come to mind right now, but
11 it's an established standard.

12 Q. What other sources? Can you give us any of them?

13 A. You could probably open up an introductory computer science
14 textbook, and it will describe what a UUID and have
15 information.

16 Q. Sir, your theory --

17 MS. GRISWOLD: Objection.

18 THE COURT: Sustained.

19 Q. Your testimony that all UUIDs are in hexadecimal is based
20 on the idea -- first of all, you understand, right, that a UUID
21 doesn't have to be in base 16? Right?

22 MS. GRISWOLD: Objection. Foundation.

23 MR. JACKSON: He's testified about it. I'm asking the
24 question.

25 THE COURT: Overruled.

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DeCapua - Cross

1 You can answer that question.

2 A. They do have to be in base 16.

3 Q. Sir, isn't it a fact that UUIDs can be created in base 32?

4 A. UUIDs?

5 Q. Yes, UUIDs.

6 A. No.

7 Q. OK. Sir, isn't it a fact that UUIDs can also be created in
8 base 64?

9 A. My understanding is all UUIDs are in hexadecimal.

10 Q. Do you know what base 32 is?

11 A. I know it as a concept but not in practice.

12 Q. Educate us on what you know about it as a concept, please.

13 A. So, as a concept, like I said, we count in base 10. It's
14 an counting system that goes up to 10. Computers count in base
15 16, which is a counting system that that goes up to the number
16 16 and incorporates letters up to F in order to represent
17 numbers higher than 10. Base 32 would be a counting system
18 that counts up to 32. Base 64 would be a counting system that
19 counts up to 64.

20 THE COURT: But have you ever seen or do you have
21 experience with either base 32 or base 64?

22 THE WITNESS: No, and I don't see them in practice in
23 digital forensics.

24 BY MR. JACKSON:

25 Q. Well, you've done some Google searches in connection with

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DeCapua - Cross

1 your testimony today, right?

2 A. Yes.

3 Q. Didn't you come across numerous articles online that
4 indicate UUIDs can be created in base 32 and base 64?

5 A. No.

6 Q. You've never seen that?

7 A. I've never seen that.

8 Q. OK. I want to show you something that's marked as Amanat
9 Exhibit 97.

10 MR. JACKSON: Let me show this just to the witness.

11 Your Honor, I'm going to pass a copy to the Court.

12 Q. Please take a look at that, sir, and then I have some
13 questions.

14 A. OK.

15 Q. Is this an article that you've reviewed before?

16 A. No.

17 Q. OK, but having looked at this, does this alter your opinion
18 at all about whether or not a UUID can be created in base 32 or
19 base 64?

20 MS. GRISWOLD: Objection. Foundation.

21 THE COURT: Sustained.

22 Q. Let me show you a different document that I'm going to mark
23 as Amanat Exhibit 98.

24 Do you see this, sir?

25 A. I do.

HckWtuz4

DeCapua - Cross

1 Q. OK. Is this something that you've ever come across in your
2 Google searching?

3 THE COURT: In his Google searching? Is that what you
4 said?

5 MR. JACKSON: Yes, your Honor.

6 MS. GRISWOLD: Objection to form. When he says this,
7 does he mean this particular article?

8 THE COURT: That's what you mean, right?

9 MR. JACKSON: Yes, Judge.

10 A. This particular blog post, no.

11 Q. OK. Have you come across blog posts where people are
12 discussing programming that they've done to create UUIDs in
13 base 64?

14 A. No.

15 MS. GRISWOLD: Objection. Foundation.

16 MR. JACKSON: It's a question.

17 THE COURT: He's answered it. He said no.

18 Next question.

19 BY MR. JACKSON:

20 Q. The fact of the matter is you understand that if a UUID was
21 created in base 64, it would include all the letters in the
22 alphabet?

23 MS. GRISWOLD: Objection.

24 THE COURT: Sustained.

25 MR. JACKSON: Your Honor, he's testified.

HckWtuz4

DeCapua - Cross

1 THE COURT: Sustained.

2 BY MR. JACKSON:

3 Q. Putting aside the creation of a UUID, do you know what base
4 64 is?

5 A. So, yes.

6 Q. OK. In base 64, all of the letters of the alphabet are
7 used, correct?

8 A. Yes, and a couple symbols also.

9 Q. OK. And the difference between base 32 and base 64 is that
10 in base 32, you use all capital letters, right?

11 MS. GRISWOLD: Objection. Foundation.

12 MR. JACKSON: He said he knows what it is.

13 MS. GRISWOLD: 32.

14 THE COURT: Actually, he hasn't testified that he
15 knows what base 32 is, so the objection's sustained.

16 MR. JACKSON: Thank you, Judge.

17 Q. Agent DeCapua, do you know what base 32 is?

18 A. So, it's not something that's used. Base 64 --

19 Q. I'm just asking whether or not you know what it is? Do you
20 know what it is?

21 A. As a concept, yes.

22 Q. As a concept. OK. Let's just talk conceptually. In base
23 32, you use the digits zero through 9 as well as all the
24 letters of the alphabet in capitals?

25 A. I have no idea.

HckWtuz4

DeCapua - Cross

1 MS. GRISWOLD: Objection. Foundation.

2 MR. JACKSON: He said he had no idea.

3 THE COURT: OK. The transcript's garbled. I'm
4 sustaining the objection.

5 BY MR. JACKSON:

6 Q. Sir, can you -- the Wikipedia page --

7 THE COURT: I'm sorry?

8 MR. JACKSON: The Wikipedia page.

9 Q. It's a fact that nowhere on the Wikipedia page for UUIDs
10 does it say that a UUID has to be in base 16, correct?

11 A. I don't know for sure, but UUIDs are in base 16.

12 Q. Sir, if you don't know for sure, that's fine. That's my
13 question. Do you know?

14 A. If it's in the Wikipedia article?

15 Q. Yes.

16 A. I don't know.

17 Q. The fact of the matter also, sir, is that --

18 MR. JACKSON: If we could take a quick look at
19 Government Exhibit 3551.

20 THE COURT: Government Exhibit 3951?

21 MR. JACKSON: 3551, your Honor.

22 THE COURT: 3551.

23 MR. JACKSON: Yes, and if we could zoom in on the top
24 half of that.

25 Q. To be very clear, you eyeballed this and thought it looked

HckWtuz4

DeCapua - Cross

1 like a UUID, right?

2 MS. GRISWOLD: Objection.

3 THE COURT: Are we putting 3551 up on the screen,
4 because I don't have anything?

5 MR. JACKSON: It's on the screen, your Honor. It may
6 be a glitch.

7 THE COURT: It wasn't on my screen.

8 MR. JACKSON: Sorry.

9 THE COURT: Can you ask the question again.

10 MR. JACKSON: Yes.

11 Q. You testified that you eyeballed this, right?

12 MS. GRISWOLD: Objection. Mischaracterizes the
13 testimony about this Message-ID.

14 THE COURT: Sustained.

15 BY MR. JACKSON:

16 Q. The fact of the matter is you can't state definitively that
17 this is a unique UUID, can you?

18 A. When looking at it --

19 Q. I'm sorry. I'm just asking, yes or no, you can't state
20 definitively that this is a UUID?

21 A. Well, it's not a UUID because it has a V in it.

22 Q. Right. And the fact of the matter is it is possible to
23 create a Message-ID that has this format that is not a UUID,
24 right?

25 MS. GRISWOLD: Objection. Foundation.

HckWtuz4

DeCapua - Cross

1 THE COURT: Sustained.

2 Q. Now, one of the things that programming believes
3 Message-IDs can do is adapt the format related to the
4 Message-ID when network conditions change, right?

5 MS. GRISWOLD: Objection to form.

6 THE COURT: Sustained. You can ask the question, but
7 I don't understand its present format.

8 MR. JACKSON: OK, Judge.

9 Q. Sir, you understand network conditions in terms of the
10 amount of traffic are something that can impact the transfer of
11 an email message, right?

12 THE COURT: That's just too vague. Do you mean
13 traffic, or do you mean something else?

14 MR. JACKSON: I mean traffic, your Honor.

15 THE COURT: OK. Reask the question and focus on
16 traffic.

17 MR. JACKSON: OK.

18 Q. You're familiar --

19 THE COURT: Actually, it's volume of traffic, right?

20 MR. JACKSON: Yes, your Honor.

21 Q. You're familiar with the concept of network traffic, right?

22 A. Yes.

23 Q. Network traffic, when it increases, impacts the movement of
24 emails from one server to another, right?

25 A. It could slow down.

HckWtuz4

DeCapua - Cross

1 Q. Right, and one of the things that a programmer can do is
2 alter the information that would appear in Message-ID,
3 depending on network traffic, correct?

4 MS. GRISWOLD: Objection. Foundation and form.

5 THE COURT: Sustained.

6 MR. JACKSON: Your Honor, could we have a sidebar?

7 THE COURT: Yes.

8 (Continued on next page)

HckWtuz4

DeCapua - Cross

1 (At sidebar)

2 THE COURT: Now, you have established that he's not a
3 coder, he's never studied coding, he's never done any coding,
4 and now you're asking him what programmers can do. Not only is
5 there no foundation, but the limited foundation that is in the
6 record suggests that he doesn't know anything about this. If
7 you want to get into, and this has been a recurring problem.
8 If you want to get into these area, you've got to lay a
9 foundation that he has an understanding, and then we can get to
10 the specific question, but you're starting with a question
11 without any background as to what he knows and what he doesn't
12 know.

13 MR. JACKSON: Judge, here's my problem. I definitely
14 tended to undermine his credentials, because I don't think this
15 witness knows what he's talking about, but he testified on
16 direct extensively about some very problematic conclusions, and
17 I don't feel like a foundational objection on cross-examination
18 of an expert witness who has testified as to these subjects is
19 appropriate. If he doesn't know the answer, he should just say
20 "I don't know the answer." I mean, the whole point of my
21 question is to determine whether he knows the answer. To say
22 lack of foundation, that's more appropriate for direct
23 examination or cross-examination of someone who is a fact
24 witness.

25 THE COURT: Let me make a couple of points. First of

HckWtuz4

DeCapua - Cross

1 all, the witness has been completely cooperative with you.

2 MR. JACKSON: Agreed.

3 THE COURT: He has not been hostile.

4 MR. JACKSON: Agreed.

5 THE COURT: He's not been obstructive. He's been
6 completely cooperative.

7 MR. JACKSON: Agreed.

8 THE COURT: So I have no reason to believe that if you
9 tried on lay a foundation with him that he would try to
10 obstruct your examination in any way. All the evidence
11 suggests so far is that he relied observation and answered
12 quite candidly whether he knows, for example, about programming
13 or whether he doesn't.

14 MR. JACKSON: I agree, Judge.

15 THE COURT: The problem with just sort of dropping
16 these questions in is it's hard to evaluate what his answer is
17 without knowing whether he's got any background in what it is
18 we're talking about, and this particularly concerned me because
19 you brought out coding, he doesn't do coding, and now you're
20 asking him what programmers do. I just don't know that he has
21 that background.

22 MR. JACKSON: I agree, Judge, but it's fundamentally
23 unfair for them to make foundation objections. I have no
24 problem with Special Agent DeCapua's testimony. In my cross of
25 an expert, for whom I have no discovery, who I never met before

HckWtuz4

DeCapua - Cross

1 to make foundational questions every time I ask a question, I
2 have no way of knowing what he does and does not know, and I
3 have to be allowed to explore that.

4 THE COURT: You did have the opportunity to question
5 him on two separate occasions, so it's not entirely accurate to
6 say you don't know anything about this witness. You've heard
7 him testify twice about the subject matter that we're talking
8 about now, and I say that not to minimize the situation.

9 MR. JACKSON: No, I understand, Judge.

10 THE COURT: What we're doing here is quite unusual
11 given that the problem came up in the middle of trial, but I
12 did want to say for the record it's not entirely accurate to
13 say that you haven't had prior exposure to the witness, because
14 he's testified at length twice before.

15 MR. JACKSON: I agree, Judge.

16 THE COURT: But I'm sensitive to what you've said.

17 I am going to give him some latitude. If I think that
18 the background is so lacking in foundation that it will be hard
19 to interpret what his answer is, I'll sustain the objection,
20 and if I don't, I will allow it. I am going to allow him some
21 latitude, though.

22 MS. GRISWOLD: I understand, your Honor. I just would
23 note for the record these appear to be network engineering and
24 coding questions. I don't think the witness has this
25 background. I can't follow the questions. I don't think he

HckWtuz4

DeCapua - Cross

1 has the foundation for them.

2 THE COURT: That's another point. On a number of the
3 questions I've sustained objections to I didn't understand the
4 question, and you've gone out of your way to bring out that he
5 doesn't have credentials in these areas, and now you're asking
6 him very technical questions. In demonstrating that he's not a
7 network engineer and he doesn't know anything about coding,
8 etc., etc., you've undermined your own ability to ask him these
9 very technical questions, because he's agreed with you. He's
10 not a network engineer, he hasn't studied computer science, he
11 hasn't done coding. And so when we get into these kinds of
12 areas, it doesn't give me comfort that he has an adequate
13 background to understand and to answer your questions.

14 MR. JACKSON: Your Honor, I definitely appreciate
15 that. I think the Court's ruling is very fair. I appreciate
16 it. I just want to point out for an expert witness as opposed
17 to a fact witness, even him saying that he does not know about
18 a particular subject is highly, highly relevant.

19 THE COURT: I don't disagree.

20 MR. JACKSON: If he can say "I don't know," if he can
21 say "I'm not familiar with that," it informs the jury's
22 understanding of what the scope of his knowledge is.

23 THE COURT: I don't disagree.

24 MS. GRISWOLD: I don't disagree either. And I think
25 he's said that, he doesn't have knowledge in these areas.

HckWtuz4

DeCapua - Cross

1 MR. JACKSON: That's fine, I just don't think a
2 foundational objection is appropriate. I think it's perfectly
3 appropriate for an expert witness to say "I don't know that,"
4 "that's beyond the area of my expertise," "I haven't looked
5 into that," "I'm not familiar with that," and I'll accept his
6 answers.

7 THE COURT: But you're not asking whether he's
8 familiar with that or not. That's kind of the problem. Your
9 refusal to ask foundation questions doesn't allow him, and
10 you've made it very clear you want yes-or-no answers to your
11 questions and so it doesn't give him an opening to say "I'm
12 sorry, I don't know about that field." Your questioning and
13 your style don't permit him to say that. If it did, we
14 wouldn't be up here.

15 MR. JACKSON: OK. Judge, I'll just note, last, we
16 have a bigger problem, but we'll address that at the break.

17 THE COURT: While we're up here, can you give us a
18 preview?

19 MR. JACKSON: Yes, I can.

20 THE COURT: OK.

21 MR. JACKSON: There's an enormous 3500 problem in that
22 I've got nothing --

23 MS. GRISWOLD: I handed you the two pieces -- Special
24 Agent DeCapua sent me an email with essentially the data from
25 the charts that we created at, like, two in the morning, before

HckWtuz4

DeCapua - Cross

1 we created them, and I handed those to you at the hearing.

2 MR. JACKSON: I think we should talk about it at the
3 break.

4 (Continued on next page)

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HckWtuz4

DeCapua - Cross

1 (In open court)

2 THE COURT: Please proceed, Mr. Jackson.

3 MR. JACKSON: Thank you very much, Judge.

4 Q. Now, to be clear, Special Agent DeCapua, in the total
5 amount of time that you've spent training on, in training on
6 relevant, that is relevant to electronic evidence and
7 specifically email headers adds up to about two weeks, right?

8 MS. GRISWOLD: Objection to form.

9 THE COURT: Sustained.

10 Q. The total amount of time you've spent in formal classes
11 related to email headers adds up to about two weeks, correct?

12 A. That's correct.

13 (Continued on next page)

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HCKTTUZ5

DeCapua - Cross

1 BY MR. JACKSON:

2 Q. Now just going back to 3511 --

3 THE COURT: 3511?

4 MR. JACKSON: Sorry, 3551, your Honor.

5 If we could have 3551 again.

6 Q. Can you point us to any authority that says that a message
7 ID in this format has to come from Apple mail?

8 A. There are articles online that -- forensic articles
9 published by forensic groups that describe that Apple mail --

10 MR. JACKSON: Sorry, I'm going to object.

11 Q. I'm just asking: Can you identify an authority?

12 THE COURT: You mean -- what do you mean by identify,
13 the author of the article?

14 MR. JACKSON: Sure, the author of the article, the
15 name of the website, the name of the article.

16 Q. Can you identify any article that says this?

17 THE COURT: Do you want him to talk about websites or
18 talk about authors or what?

19 MR. JACKSON: Let's take it one by one, Judge.

20 Q. Can you identify any published book that says that a
21 message ID in this format has to come from Apple mail?

22 A. Sitting here today, I can't think of any published book.

23 Q. Okay. Can you identify a specific article anywhere that
24 says a message ID in the format on Government Exhibit 3551 has
25 to come from Apple mail?

HCKTTUZ5

DeCapua - Cross

1 A. I said there are articles, I cannot identify a specific one
2 sitting here today.

3 Q. Now you knew you were going to be testifying about this
4 particular subject, right?

5 A. That's correct.

6 Q. And you were asked some questions about this at a separate
7 proceeding, correct?

8 A. That's correct.

9 Q. Did you endeavor to try to find any specific articles that
10 suggest that this message ID format necessarily indicates Apple
11 mail?

12 A. So now that you bring up the earlier hearing, I think we
13 did give you a copy of an article I found that identifies a
14 GUID an at sign then domain name as belonging to Apple mail.

15 Q. I don't think that's accurate, but my question is not
16 whether or not Apple mail can create a GUID like this, but
17 whether or not the creation of a GUID with this format
18 necessarily indicates Apple mail?

19 THE COURT: Could we refer to it as G-U-I-D? Because
20 I'm not sure how the court reporter is supposed deal with
21 "GUID."

22 MR. JACKSON: Yes, your Honor, just using the
23 witness's language.

24 Q. It's probably better to refer to it as a UUID. Same thing,
25 right?

HCKTTUZ5

DeCapua - Cross

1 A. I agree, yes.

2 Q. GUID and UUID are the same thing, correct?

3 A. Same thing.

4 Q. Just to confirm, Special Agent DeCapua, I want to confirm,
5 as you sit here now, you're not aware of any specific authority
6 that you can identify that says that a UUID in this format must
7 come from Apple mail, right?

8 A. Sitting here today, no.

9 Q. And you do concede that a message ID can contain these if
10 it's not a base 16 message ID?

11 MS. GRISWOLD: Objection.

12 THE COURT: Sustained.

13 Q. You understand that not all messages IDs are in base 16,
14 right?

15 A. Yes.

16 Q. Not all message IDs are hexadecimal, right?

17 A. Correct.

18 Q. And if a message ID is not hexadecimal, it could contain a
19 V, right?

20 A. Yes.

21 Q. And you can't say that the message ID in 3551 is
22 necessarily supposed to be hexadecimal?

23 THE COURT: Supposed to be? Sustained.

24 Q. Well, you can't say --

25 MR. JACKSON: Your Honor, it's a little bit --

HCKTTUZ5

DeCapua - Cross

1 Q. It's not hexadecimal, right?

2 MS. GRISWOLD: Objection.

3 THE COURT: I don't understand the question.

4 Q. This is not a hexadecimal format for this message ID,
5 right?

6 MS. GRISWOLD: Objection, asked and answered.

7 THE COURT: No, I will allow him to and answer.

8 Is this a hexadecimal format?

9 THE WITNESS: No, because it has a V, but it's
10 supposed to be.

11 MR. JACKSON: So that gets to my question. That's
12 where I was headed, Judge.

13 BY MR. JACKSON:

14 Q. You can't say definitively that this is supposed to be
15 hexadecimal, can you?

16 A. So I'm bound by common sense here, and when I see this
17 format, 8-4-4-4-12, and everything conforms and looks like hex,
18 and I read articles that say that it's supposed to be hex for
19 Apple mail, and I do experiments myself and every single time I
20 sent something from Apple mail it's in hex, it's UUID and has
21 the domain name.

22 Q. Do you understand there's a difference between all Apple
23 mail emails being in hex and all hex emails necessarily
24 indicate Apple mail, right? Those two things are not the same.

25 MS. GRISWOLD: Objection, form, foundation.

HCKTTUZ5

DeCapua - Cross

1 THE COURT: Do you understand the question?

2 THE WITNESS: I don't.

3 Q. Let me rephrase that then. Your testimony is that all
4 Apple mail message IDs are in hex, right?

5 A. Just for clarification, this entire thing is the message
6 ID, so the beginning -- everything before the at sign is in
7 hex, everything after is just plain letters.

8 Q. My only question is your testimony is that all Apple mail
9 IDs are supposed to be in hex, right?

10 A. Correct.

11 Q. You can't say definitively that this is a Apple mail
12 message ID, right?

13 MS. GRISWOLD: Objection, form.

14 THE COURT: Overruled.

15 A. There could be another service that uses the exact similar,
16 and I wouldn't --

17 Q. So the answer is yes, right? You can't say definitively.
18 You agree with that?

19 A. Correct.

20 Q. And the fact of the matter is there are numerous different
21 email services, right?

22 A. Correct.

23 Q. There are lists of email clients available online that run
24 into the hundreds, right?

25 A. Yes.

HCKTTUZ5

DeCapua - Cross

1 Q. There are numerous versions even of the specific email
2 clients that are associated with a particular company, right?

3 A. Could you repeat that question?

4 Q. For example, Blackberry has had various versions of its
5 email client that it used on the Blackberry, right?

6 A. So I don't know that for a fact.

7 Q. Well, you don't believe that they're still using the exact
8 same email operating system today as they were ten years ago,
9 do you?

10 A. I have no idea.

11 MS. GRISWOLD: Objection, foundation.

12 Q. You have no idea. But the point being you haven't gone out
13 and examined what the message ID format is for every email
14 client out there, have you?

15 A. No.

16 Q. So you don't know whether or not there's an email client
17 that creates a message ID that looks like this with a V,
18 correct?

19 A. So a message ID that looks like it's going to be a UUID but
20 then it changes something --

21 Q. I'm not asking you whether it looks like a UUID, what I'm
22 saying is you don't know whether there are other email clients
23 that have a message ID that takes this approximate format but
24 contains Vs, correct?

25 A. I would be shocked to find that out.

HCKTTUZ5

DeCapua - Cross

1 Q. You don't know, correct?

2 A. Correct.

3 Q. Now the fact of the matter is even with regard to your
4 testimony about the epoch timestamp, epoch timestamps can come
5 in many different formats, right?

6 A. That's correct.

7 Q. It's not just the format that you pointed out on your
8 chart, right?

9 A. The format I pointed out on the chart is overwhelmingly
10 used. It's the most common one.

11 Q. But there are other forms of epoch timestamps, right?

12 A. Yes.

13 Q. And there are other forms of timestamps in general that are
14 not epoch, right?

15 A. Yes.

16 Q. There are timestamps coded to the year 1900, correct?

17 A. January 1st, 1900.

18 Q. Bingo. There are timestamps coded to that, correct?

19 A. Correct.

20 Q. There are also message IDs that create randomization by
21 combining a timestamp in one of the formats available with some
22 other information, correct?

23 A. That's correct.

24 Q. You haven't -- for the message ID that you looked at for
25 the Blackberry message that you claim was irregular --

HCKTTUZ5

DeCapua - Cross

1 MS. GRISWOLD: Objection.

2 THE COURT: Sustained.

3 Q. Can we go to 3579, please, 3579B.

4 So you see there's a hidden timestamp here, right?

5 A. That's correct.

6 Q. In your prior testimony you said that one of the things
7 that you looked at was you said that this looked like it could
8 potentially correspond with hexadecimal, right?

9 A. I don't think I said that -- or no, so you're referring to
10 a prior hearing.

11 Q. Yes, in a prior hearing.

12 A. Yes, I tried everything.

13 Q. One of the things that you did is explore whether or not
14 this could be a potentially hexadecimal timestamp, right?

15 A. Yes.

16 Q. Because you're aware that there is such a thing as a
17 hexadecimal timestamp that could potentially look like this on
18 the surface, right?

19 A. Yes.

20 Q. And your conclusion was if you converted it from the
21 hexadecimal timestamp via the methods that you're aware of, it
22 didn't come out to a time that you thought made sense, right?

23 A. So the methods that I'm aware of and the methods that I
24 tested are the most commonly used once.

25 Q. But there are a number of other different types -- there

HCKTTUZ5

DeCapua - Cross

1 are a number of different methods for converting a hexadecimal
2 timestamp that you didn't explore, right?

3 A. All the methods of converting a hexadecimal timestamp I
4 tried. I'm not aware of any other methods.

5 Q. You can't say definitively, right, that isn't just a
6 randomly generated number on this, right?

7 MS. GRISWOLD: Objection to form. Which number are we
8 talking about?

9 MR. JACKSON: Withdrawn.

10 Q. On 3579B, with the December 2nd 2008 email, you can't say
11 definitively that the message ID software on Blackberry didn't
12 just generate a random number here, right?

13 A. So when every other instance --

14 Q. I'm asking yes or no.

15 THE COURT: Can you answer it yes or no?

16 THE WITNESS: Could you repeat the question?

17 Q. You cannot say definitively that the message ID associated
18 with this message on December 2nd, 2008 was not just a randomly
19 generated number by this software. You agree with that, right?

20 A. Could it be? Sure.

21 Q. Okay. And the fact of the matter is you haven't gone back
22 to ask anyone at Blackberry --

23 THE COURT: You've already asked him about Blackberry
24 over and over and over again.

25 MR. JACKSON: Judge, I'm very close to my end.

HCKTTUZ5

DeCapua - Cross

1 We could take that down.

2 Q. Sir, you're also aware that there have been some very well
3 publicized glitches associated with Blackberries and their
4 timestamps, right?

5 A. No.

6 Q. You're aware of well-published glitches associated with
7 epoch timestamps, correct?

8 A. No.

9 Q. You never heard of a glitch associated -- that creates a
10 date of 2045 in computers?

11 THE COURT: I thought we were talking about
12 Blackberries.

13 MR. JACKSON: I'm talking about epoch timestamps in
14 general.

15 Q. You heard of an epoch timestamp glitch that accidentally
16 creates a date of 2045, right?

17 MS. GRISWOLD: Objection to form, to "in computers."

18 Q. Sir, epoch timestamps are used more broadly than just
19 Blackberries, right?

20 A. That's correct, but could I reanswer the question that you
21 just asked me?

22 Q. I don't even know what question we would be talking about.

23 A. You asked me --

24 Q. Let me just focus this on this question really quickly then
25 we can address anything.

HCKTTUZ5

DeCapua - Cross

1 You are aware epoch time is used in many different
2 types of computers, right?

3 A. That's correct.

4 Q. And there have been well-publicized glitches associated
5 epoch time, right?

6 A. I'm familiar with just one.

7 Q. What's the one you're familiar with?

8 A. The one I'm familiar with is it's like a Y2K glitch, and
9 it's basically when -- an epoch timestamp is just a big number,
10 and eventually it will get to be such a big number that it will
11 overflow the bounds of the specific piece of memory where the
12 information is stored. And I think it's going to happen in
13 like 2030 something, I'm not 100 percent sure about that, but
14 there's discussions on what to do before then and whether it's
15 going to cause the end of the world or kind of like Y2K.

16 That's the one about publicized glitch I'm aware of.

17 Q. 2030 something, right?

18 A. That's what I think.

19 Q. And you have seen publications online that talk about
20 people -- their epoch timestamps glitching to create an
21 incorrect date on their device of 2030-something, right?

22 A. No, I have never seen that.

23 Q. Have you researched that at all?

24 A. No.

25 Q. Okay. Have you heard of the Etisalat virus that infected

HCKTTUZ5

DeCapua - Cross

1 computers and Blackberries in 2009?

2 THE COURT: Could you spell that for the court
3 reporter, please?

4 MR. JACKSON: E-T-I-S-A-L-A-T?

5 A. I never heard of it.

6 MR. JACKSON: May I have one moment, your Honor?

7 THE COURT: Yes.

8 (Pause)

9 Q. Are you familiar with any viruses that infected
10 Blackberries in 2009 for travelers in Dubai?

11 A. No.

12 Q. Now just going towards the end, your analysis on the
13 document that is 3579A starts on March 10, 2009, right?

14 A. What is --

15 Q. 3579A.

16 Before we get there, just one other question, did you
17 look at the server traffic associated with the messages that
18 you analyzed?

19 MS. GRISWOLD: Objection, foundation.

20 THE COURT: Overruled.

21 A. If I understand you correctly, you mean the server traffic
22 on January 27, 2009, for instance, for this email?

23 Q. No, I guess what I'm asking is: Did you look at whether
24 the server routes that were taken by the messages associated
25 here, the messages that are marked as government exhibits, the

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DeCapua - Cross

1 emails you were focused on, did you look at whether the server
2 routes approximated the server routes that you saw in the other
3 messages?

4 THE COURT: Do you understand the question?

5 A. I think you're asking: Did I look at the headers?

6 Q. Yes.

7 A. And look at the IP addresses contained in the headers?

8 Q. Yes.

9 A. So I could answer it in two parts. The first part is for
10 the emails in question there were no server routing information
11 because they were sent emails. So it's just what was on the
12 defendant's computer that he gave to us.

13 Q. So you weren't able to analyze that?

14 A. I wasn't able to analyze it.

15 Q. Let me ask you this, you're looking here at March 10, 2009,
16 right?

17 A. That's correct.

18 Q. Now your comparator messages end January 30, 2009 and pick
19 up again on March 11, 2009, right?

20 A. That's correct.

21 Q. So the email that you were focused in on is March 10, 2009
22 from Omar Amanat to Steve Maiden, right?

23 A. Yes.

24 Q. Are you aware that there is a gap in Mr. Maiden's emails on
25 his computer that goes exactly to March 10, 2009?

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DeCapua - Cross

1 A. No.

2 Q. You are not aware of that?

3 A. No.

4 Q. That's something you never discussed with other FBI agents?

5 A. I think you asked me that question at a prior hearing and I
6 said no.

7 Q. After I asked you that, did you explore at all whether
8 there was anything to be gleaned about that?

9 A. No.

10 Q. Okay. When you were looking at the fact that the
11 message -- the comparator message is cut off at the end of
12 January and don't pick up again until the day after March 10,
13 2009, did you attempt to discover whether there was any missing
14 data that would be relevant to your investigation on
15 Mr. Maiden's emails or computer?

16 A. For the purposes of what I was trying to do here, I was
17 trying to show an example so when I was explaining something
18 complex, people could see what things are supposed to look
19 like. So didn't explore any of that, no.

20 Q. And you don't know Steve Maiden, right?

21 A. I saw him, he was called as a witness at a prior hearing,
22 but other than that, no, I never met him.

23 Q. You never worked with him?

24 A. No.

25 Q. You don't know what he did with the emails that are missing

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1 from January 30 to March 10, right?

2 A. I have no idea.

3 MR. JACKSON: No further questions of this witness.

4 MS. GRISWOLD: One question for redirect, your Honor?

5 THE COURT: Yes.

6 REDIRECT EXAMINATION

7 BY MS. GRISWOLD:

8 Q. Special Agent DeCapua, did any of the questions that
9 Mr. Jackson just asked you change any of the opinions that you
10 offered in your direct testimony?

11 A. No.

12 MS. GRISWOLD: No further questions.

13 THE COURT: Anything else, sir?

14 MR. JACKSON: No, Judge.

15 THE COURT: You can step down.

16 The government may call its next witness.

17 MS. GRISWOLD: The government calls Stephen Maiden,
18 but we might need a minute, your Honor, to make sure the
19 marshals bring him up.

20 THE COURT: All right. So should we take a brief
21 recess?

22 MS. GRISWOLD: If we could, your Honor.

23 THE COURT: Ladies and gentlemen, we'll have a take a
24 brief recess.

25 (Continued on next page)

HCKTTUZ5

1 (Jury not present)

2 THE COURT: I received another note from the jury,
3 Court Exhibit 18, reads as follows: I have to take an online
4 class for a job performance for Verizon on December 21st, 2017
5 at 1:30 p.m. in my Bronx office. It's the last one. I thought
6 we would be done. So I put off. It's a must. Signed Eric
7 Eleam.

8 Second communication was just orally through
9 Mr. Ruocco, juror number four, Tara Charlton, asked me if it
10 becomes apparent that she will have to be excused that she ask
11 that she be excused today, given that she's got to try to get
12 to JFK Airport tomorrow. And so --

13 MS. GRISWOLD: Your Honor, may I speak to Mr. Maiden
14 about the issue that we discussed this morning?

15 THE COURT: Yes.

16 MR. JACKSON: Your Honor, she's been an
17 extraordinarily diligent juror, we're very appreciative, but
18 we're happy to have her excused at this point.

19 MR. McRAE: Agreed, your Honor.

20 MR. WILLIAMS: Your Honor, I think before the defense
21 had some suggestion to swapping her as an alternate.
22 Mr. Jackson made that proposal.

23 MR. JACKSON: My suggestion about that was dependent
24 on my hope that we would be able to conclude the case by today,
25 which if we had gotten through summations I think we could have

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1 substituted her as an alternate and not released, but since
2 she's not going to hear the end of the case, I think it would
3 be very difficult to use her.

4 THE COURT: There's no way we could continue with her.
5 The only way we could have tried to hold onto her in the form
6 of an alternate is if the trial had been completed except for
7 deliberations. It hasn't, so there's nothing I can do about
8 preserving her role on the jury. It's just impossible.

9 MR. WILLIAMS: We understand, we don't object to her
10 being removed.

11 THE COURT: All right. So that at the close of the
12 day, Mr. Ruocco, I ask you if you could bring Ms. Charlton out
13 so we could all express our appreciation to her and tell her
14 that she is excused. So we'll do that at the end of the day.

15 MR. McRAE: Your Honor, what was the juror number of
16 the first person, the first note you described?

17 THE COURT: This is a man we heard from recently, Eric
18 Eleam. He sent out a note about an issue, I think it was last
19 week. He's alternate number three, Mr. Ruocco informs me.

20 So you want to think about what we should do about
21 Mr. Eleam?

22 MR. WILLIAMS: Your Honor, we would suggest right now
23 that we get some more information from him potentially
24 including the nature of this training. Every employer,
25 presumably, certainly the government, have online trainings

HCKTTUZ5

1 that you have to do by a certain date. If this is something
2 that could be pushed off, given the critical day that we have
3 tomorrow, we can't break at 12:00 so he can go up to the Bronx
4 by 1:00.

5 THE COURT: Mr. Jackson?

6 MR. JACKSON: I think, Judge, we agree with the
7 government that we should try to inquire first if it's possible
8 we should strike him.

9 THE COURT: Bring out Mr. Eleam.

10 MR. WILLIAMS: Your Honor, I'm sorry, we weren't
11 suggesting that we bring him now at the sidebar, but maybe at
12 the close of evidence, given that we have Mr. Maiden ready to
13 go.

14 THE COURT: All right. I just told him to bring it
15 out.

16 MR. WILLIAMS: That's fine, your Honor, it's not going
17 to take that long.

18 (At sidebar, juror present)

19 THE COURT: We have your note.

20 JUROR: So you understand, there's a performance thing
21 I have to do for my technician. I'm a manager with Verizon. I
22 have to take a performance course that I put off because we
23 have to be here. The last day I could take it is this day.
24 It's an hour course. Either I could bring my computer here and
25 we could do a break during that time, but I have to handshake,

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1 so I can't let it run. It pops up on the screen: Are you
2 there? Type in that time.

3 THE COURT: Absolutely.

4 JUROR: Even though I know it, it's to write their
5 appraisals and gets promotions out.

6 THE COURT: You have to do it.

7 JUROR: I have to do it.

8 THE COURT: You could do it here if you brought your
9 computer in?

10 JUROR: And I could get to the internet.

11 THE COURT: We have that capability.

12 JUROR: I could use my phone as a hot spot to get
13 online. I don't have to plug into your network, I just have to
14 have wi-fi access. I could uses my phone as a hot spot, but to
15 do their appraisals for January.

16 THE COURT: Is there a particular time you got do
17 this?

18 JUROR: I have to log in. There's a class course
19 where it's online structure, so they say: Are you there? You
20 have to type in an answer as it's going on.

21 THE COURT: What time?

22 JUROR: 1:30. I was going to do it in the Bronx, so I
23 need time to go to the Bronx, or start it 1:30 here. It was at
24 3:30 today, which I wouldn't make it up to the Bronx.

25 THE COURT: Okay. We're going to need to -- I'm going

HCKTTUZ5

1 to need to issue an order so he could bring electronics in.

2 JUROR: Or I could --

3 MR. NAFTALIS: Your Honor, may I ask a question?

4 Do you need to be at a specific Verizon computer?

5 JUROR: It has to be mine. My secure token is built
6 into my computer, so I have my password and I have to log in
7 and put my V code.

8 THE COURT: Does anybody think there's going to be a
9 problem with this whole hot spot thing?

10 MS. GRISWOLD: That's what Special Agent DeCapua used.

11 MR. JACKSON: We have all used it.

12 THE COURT: We'll plan on breaking a few minutes
13 before 1:30, or you tell us.

14 JUROR: Let me call them and let me know that I will
15 bring my laptop here and I will be able to do the course while
16 I'm here, because I was coordinating whether I could make it
17 back uptown to my office in the Bronx to do it. So there's not
18 a problem.

19 THE COURT: Thank you very much.

20 (Juror not present)

21 THE COURT: So we're going to make it work.

22 MS. GRISWOLD: Your Honor, did we hear back from the
23 jury as to the 5:00 p.m. day tomorrow, or is this --

24 THE COURT: No, we haven't heard.

25 MS. GRISWOLD: Was today a 2:30 day?

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1 THE COURT: I think today is a 2:30 day.

2 DEPUTY CLERK: 2:30.

3 THE COURT: Have they gotten back to you about sitting
4 to 5:00 once we get into summations?

5 DEPUTY CLERK: They said no.

6 MS. GRISWOLD: I thought about talking to the jury now
7 about next week. I know none of us want to be here, but I
8 don't know if Mr. Jackson has a sense of how long his cross of
9 Mr. Maiden will be. He has a sense of his testimony from the
10 hearing, but I don't think I have more than half an hour, 45
11 minutes on direct, but if I finish today that would be
12 surprising.

13 I don't know, Mr. Jackson, if --

14 MR. JACKSON: It's not a super long cross. I think we
15 know the points we need to make, if we could cut it down, I
16 don't know if we could ask the jury to stay until 3:00 today.
17 If we both agree to do a half hour, I think we could finish it.

18 MR. NAFTALIS: Your Honor, did Mr. Ruocco say they
19 could not sit until 5:00?

20 THE COURT: That's what he said. We have tried this
21 jury's patience, let's be honest.

22 So I am happy to raise with them next week, no idea,
23 of course, what they're going to say. The question will always
24 be: How long will this go on for?

25 MS. GRISWOLD: I think about an hour, I think we can

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1 say that to them.

2 DEPUTY CLERK: They can't stay until 3:00.

3 THE COURT: All right.

4 DEPUTY CLERK: Child care issues.

5 MR. JACKSON: Let's try to complete as much as we can
6 with Mr. Maiden and do a quick cross of him tomorrow and then
7 we'll go to summations.

8 MR. NAFTALIS: Your Honor, in terms of planning, were
9 you going to explain to them we're moving to summations?

10 THE COURT: I already did that, sir.

11 MR. NAFTALIS: What I'm asking is they said they don't
12 want to stay until 3:00. I don't know if they understand the
13 logistics.

14 THE COURT: They have child care issues. Someone has
15 to take care of a child today.

16 MR. NAFTALIS: I mean 5 o'clock, 5 o'clock on Friday.
17 I know we're imposing on them. To the extent they realize they
18 may be almost done, potentially. I know we're all sort of
19 stuck, but I hope that they understand that when we say
20 summations, that means that they may almost get the case, as
21 opposed to what is going on for another week of testimony.
22 They don't necessarily know that.

23 (Continued on next page)

HCKTTUZ5

Maiden - Direct

1 (Jury present)

2 THE COURT: Government call its next witness.

3 MS. GRISWOLD: The government calls Stephen Maiden.

4 STEPHEN EWING MAIDEN,

5 called as a witness by the Government,

6 having been duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 BY MS. GRISWOLD:

9 Q. Good afternoon, Mr. Maiden.

10 A. Good afternoon.

11 MS. GRISWOLD: If we could put up for Mr. Maiden
12 Amanat Exhibit 9002 in redacted form.

13 Q. You see that document in front of you, Mr. Maiden?

14 A. I do.

15 Q. And I want to focus you in particular on the email at
16 11:07 p.m. that appears to be from Omar Amanat to Stephen
17 Maiden, subject event BESN. Do you see that?

18 A. Yes.

19 Q. Did you receive this 11:07 p.m. email from Omar Amanat on
20 December 2nd, 2008?

21 A. No.

22 Q. How sure are you that you did not receive it?

23 A. I'm positive.

24 Q. When did you first tell the government you believed you did
25 not receive this email?

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Maiden - Direct

1 A. Several weeks ago on a Sunday I was brought in and I was
2 allowed to read the entire email carefully.

3 MR. JACKSON: Objection, your Honor. Could we get a
4 precise date?

5 THE COURT: Do you remember -- you said it was a
6 Sunday, right, Mr. Maiden, do you recall it being a Sunday?

7 THE WITNESS: I do.

8 THE COURT: Can you date it for us more precisely?
9 Was it last Sunday?

10 THE WITNESS: No.

11 THE COURT: Was it the Sunday before that?

12 THE WITNESS: No, it was the one before that.

13 THE COURT: Okay.

14 MS. GRISWOLD: Your Honor, we're happy to proffer for
15 the record it was December 3rd.

16 MR. JACKSON: Accepted.

17 THE COURT: All right.

18 BY MS. GRISWOLD:

19 Q. How do you know you didn't receive this email?

20 A. Well, can I reread it?

21 Q. Yes.

22 A. I'm not able to see the rest of the email?

23 MS. GRISWOLD: Could we provide an unredacted version
24 of the email to Mr. Maiden.

25 THE COURT: What is the exhibit number on the exhibit

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Maiden - Direct

1 he's now being shown?

2 MS. GRISWOLD: Government Exhibit 3575UR, just marked
3 for identification.

4 THE COURT: Okay.

5 MS. GRISWOLD: If we could pull up for the jury the
6 redacted version, please, Amanat Exhibit 9002, and highlight
7 the portion of the email at the bottom that says: Therefore,
8 the funds are to remain at Enable as my security deposit.

9 THE WITNESS: Right.

10 Q. Mr. Maiden, did you ever agree to leave \$2 million at
11 Enable as a security deposit?

12 A. No.

13 Q. I want to pull up for you Government Exhibit 2965 in
14 evidence.

15 MS. GRISWOLD: If we could highlight the bottom email
16 from Omar Amanat to Irfan Amanat on December 19 at 6:48 a.m.

17 Q. The email that you just looked at that I asked you if you
18 actually received it, that was dated December 2nd, 2008,
19 Mr. Maiden?

20 A. Yes.

21 MS. GRISWOLD: Can I ask Ms. Pyun to highlight the
22 bottom section beginning with: He spoke with Maiden.

23 Q. Can you read that first sentence, please.

24 A. Sure. It says: He spoke with Maiden where they apparently
25 discussed difficulties getting money out of Enable. Maiden has

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Maiden - Direct

1 tried to reach me and is asking for his \$2 million back.

2 Q. As of December 19, 2008, had you agreed to leave your 2
3 million at Enable as a security deposit?

4 A. No, no, absolutely not. And this is just 17 --

5 MR. JACKSON: Objection.

6 THE COURT: Sustained.

7 MS. GRISWOLD: And sustained, is the entire thing
8 struck, or the does the "absolutely" not stand?

9 MR. JACKSON: I'm only objecting to the non-responsive
10 second portion.

11 THE COURT: He objecting to "and this is just," that's
12 what he's objecting to.

13 MS. GRISWOLD: So we'll leave it at "absolutely not."

14 Let's pull up Government Exhibit 3062A in evidence.

15 Q. Do you have a hard copy of that, Mr. Maiden?

16 A. I do.

17 Q. Directing your attention to the email on Thursday,
18 December 18, 2008, from you to Irfan Amanat, do you see that?

19 A. I do.

20 Q. Can you read what you wrote to Irfan Amanat on Thursday,
21 December 18?

22 A. Sure. I wrote: Okay, cool. And on that 2 million I sent
23 last month, am I at least earning interest on that while its
24 sitting there? Been there longer than I had hoped.

25 Q. As of December 18, had you agreed to leave 2 million at

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Maiden - Direct

1 Enable as a security deposit?

2 A. No.

3 Q. Mr. Maiden, how many documents were you shown during the
4 course of your trial testimony?

5 A. I have no idea. Many.

6 Q. And during your trial testimony, you were cross-examined by
7 Mr. Jackson for a number of days?

8 A. I was.

9 Q. When you were shown documents during your testimony at
10 trial, either by the government or by Mr. Jackson, did the
11 thought cross your mind that any of the documents might not be
12 authentic?

13 A. No. No, I am in a federal courtroom --

14 MR. JACKSON: Objection.

15 THE COURT: Sustained.

16 Q. The answer is no?

17 A. Right, correct.

18 Q. Were you given an opportunity to give explanatory answers
19 when you were cross-examined by Mr. Jackson?

20 MR. JACKSON: Objection.

21 THE COURT: Sustained. The jury I'm sure remembers
22 the cross-examination.

23 MS. GRISWOLD: Fair enough. If we could pull up the
24 transcript from the trial at 1353, please.

25 Q. Do you recall, Mr. Maiden, that during your

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Maiden - Direct

1 cross-examination Mr. Jackson showed you the unredacted
2 version, the longer version of this email at some point?

3 A. I do remember that he showed me the unredacted version
4 briefly.

5 THE COURT: When you say the "unredacted version" of
6 this email, could identify for the record what it is you're
7 talking about?

8 MS. GRISWOLD: Yes, your Honor, it's marked for
9 identification as Government Exhibit 3575UR.

10 THE COURT: Okay.

11 BY MS. GRISWOLD:

12 Q. And you see that transcript up on the screen, Mr. Maiden?

13 A. I do.

14 Q. And do you see that when Mr. Jackson asked if you
15 remembered the document, you responded: Vaguely, yes?

16 A. Yes.

17 Q. And you have now given the answer that that 11:07 email,
18 you did not receive it. Can you explain to the jury why you
19 said you vaguely recalled it?

20 A. Well, couple of reasons. As I mentioned, sitting in a
21 federal courtroom, I assumed everything that came to me was
22 legitimate. So my first assumption, having looked at many,
23 many legitimate emails, was that this was.

24 Secondly, what I received was only a redacted version,
25 and I wasn't given a lot of time to look at it. And so I said:

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Maiden - Direct

1 Vaguely, yes.

2 MS. GRISWOLD: And then if we pull up the transcript
3 at page 1484. If we could highlight lines 9 through 12.

4 Q. If you could read lines 9 through 12 of this transcript,
5 please.

6 A. Sure. It says: So your Honor, the full version is in your
7 binder. I'm going to place -- your Honor, I can't ask the
8 witness if he recognizes it because there's context missing,
9 but I offer 9002.

10 Q. So at this point Mr. Jackson did not ask you if you
11 recognized Amanat Exhibit 9002?

12 A. Right, he did not.

13 Q. Let's turn to March 10, 2009.

14 MS. GRISWOLD: If we could put on the screen for the
15 jury Amanat Exhibit 908, and if we could pass up what is marked
16 for identification in unredacted form as Government
17 Exhibit 3578UR.

18 Q. One last question, Mr. Maiden, on the December 2nd, 2008
19 email we just looked at. When you met at the U.S. Attorney's
20 Office on or about December 3rd of this year, were you given an
21 opportunity to look at the contents of the computers that you
22 previously turned over to the FBI in 2013?

23 A. I was, yes, and the context of that I wanted to comment on.

24 THE COURT: No, there's no question pending.

25 Next question.

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Maiden - Direct

1 Q. And based on your review, was Amanat Exhibit 9002 we just
2 looked at on your computer?

3 A. No, it wasn't on my computer.

4 Q. Turning to March 10, 2009, Amanat Exhibit 908, did you
5 review emails on your computer for this day as well when you
6 met at the U.S. Attorney's Office?

7 A. I did.

8 Q. In particular, did you look for this 11:33 a.m. email?

9 A. Yes, I looked for it.

10 Q. Did you find it on your computer?

11 A. No, I did not.

12 Q. Sitting here today, what is your answer to the question of
13 whether or not you received this email from Mr. Amanat on
14 Tuesday, March 10, 2009?

15 A. No, I never received it.

16 Q. In this email, if we could highlight the section at the
17 bottom where Mr. Amanat says my personal guarantee will be
18 withdrawn without this assurance, do you see that?

19 A. I do.

20 Q. As of March 10, 2009, had Mr. Amanat offered a personal
21 guarantee with respect to the Enable Investment?

22 A. No, definitely not.

23 Q. Why do you say that?

24 A. This is important, the context. This is two days after
25 March 8. March 8 was the Sunday I spoke about at testimony

HCKTTUZ5

Maiden - Direct

1 quite a bit, which is the first day we had this conference call
2 that I was told that the Enable funds were missing.

3 The next day, March 9, one day before this purported
4 email, that morning I got the call from my investor, I lied to
5 them and told them things were okay. I called Omar and told
6 him I was lying. We decided to have a call that night to start
7 pushing down the road of figuring out a settlement.

8 And then this is the next day, so he definitely didn't
9 offer me a personal guarantee. If I had received that personal
10 guarantee there would have been many emails back and forth
11 about it. It would have been a conversation topic. We talked
12 every day that week and really for the next months. And so
13 absolutely not. I never received this.

14 Q. I'm not going to go through each time you were asked about
15 these documents by Mr. Jackson. Is your answer the same as to
16 why for this one you didn't state that you didn't believe you
17 received it when you were shown it during your trial -- during
18 the trial?

19 A. Yeah, it's the same, it's -- I assumed what I --

20 MR. JACKSON: Objection.

21 THE COURT: Next question.

22 Q. I want to turn to June 2nd, 2011.

23 MS. GRISWOLD: Put up Amanat Exhibit 9010 on the
24 screen and show it to the witness and the Court in unredacted
25 form marked Government Exhibit 3576UR.

HCKTTUZ5

Maiden - Direct

1 Q. Mr. Maiden, when you met at the U.S. Attorney's Office,
2 were you given time to look at the Thursday, June 2nd, 2011
3 email at 6:13 p.m.?

4 A. I was, yes.

5 Q. Did you look for it on your computers?

6 A. I did look.

7 Q. Did you find it?

8 A. No.

9 Q. Sitting here today, what is your testimony whether you
10 received this email on June 2nd, 2011?

11 A. I never received it.

12 Q. Now if we zoom out on this email and go to the bottom,
13 these bottom e-mails that talk about recording calls with your
14 investors, did you receive those emails?

15 A. I did, yes.

16 Q. Is your testimony still that you did have conversations
17 with Mr. Amanat in which he encouraged you to record your calls
18 with your investors?

19 A. We did have conversations like that, yes.

20 Q. And in those conversations did Mr. Amanat ever suggest the
21 possibility of telling your investors that your investment in
22 Enable was gone?

23 A. No, absolutely not.

24 MS. GRISWOLD: Let's go to the next one. If we could
25 pull up Government Exhibit -- Amanat Exhibit 9013 and show the

HCKTTUZ5

Maiden - Direct

1 witness and Court what is marked for identification as
2 Government Exhibit 3577UR.

3 Q. I want to direct your attention to the email that appears
4 on the screen on Monday, March 26, 2012 at 11:34 a.m.

5 Did you review your computer for this day?

6 A. I did, yes.

7 Q. Is this email on your computer?

8 A. No, it's not.

9 Q. And sitting here today, what is your testimony as to
10 whether or not you received this email on that day?

11 A. I did not receive it on that day.

12 Q. Finally, I want to ask you about your deletion practices
13 with respect to your computer. You had a desktop and a laptop?

14 A. Yes.

15 Q. Are you aware that there's a gap of emails on your computer
16 between January 2009 and March 10 of 2009?

17 A. Yes, I have been made aware of that.

18 Q. Do you know why that is the case?

19 A. I do not.

20 Q. Can you describe what your practice was with respect to
21 deleting emails in the time period 2008 until the FBI showed up
22 on your doorstep in September of 2012?

23 A. Sure. My general practice for emails -- I received a lot
24 of emails, and too many to delete as they came in or cull
25 because I received a lot of information from brokerage houses

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Maiden - Direct

1 that -- with stock recommendations all day.

2 So I would allow them to come in like a river, then
3 recognized at some point it would hit a barrier and kind of
4 freeze until I deleted some. So I'm not sure how many times,
5 but I initially would just go down 20 pages or something to the
6 bottom chronologically and delete a chunk of them, and that
7 would take a minute or two to kind of delete. And then I would
8 empty the trash to create the space, and then that would allow
9 the emails to start coming.

10 But I realized that was not an efficient way to do it
11 because it might delete emails I wanted to keep for any reason.
12 So what I started to do, which I did for the rest of the time,
13 is I would sort the sender -- sort by sender, and then I would
14 try to delete the spam email, essentially. So especially the
15 research, say Morgan Stanley or Goldman Sachs or Bank of
16 America, they would send me very large files, a lot of memory
17 in each of them and large attachments, so when I deleted them,
18 it would create the most space, and not damage -- leave my
19 other -- delete any other emails that I cared about.

20 Q. Between 2008 and 2012, was it your practice to delete
21 emails with Omar Amanat?

22 A. No, absolutely not.

23 Q. You testified during the trial that Omar Amanat told you he
24 sold his online trading company for quite a bit of money. Do
25 you recall that?

HCKTTUZ5

Maiden - Direct

1 A. I do.

2 Q. In the context of that conversation, did Mr. Amanat tell
3 you what role he had in the trading company?

4 MR. JACKSON: Objection.

5 THE COURT: Grounds?

6 MR. JACKSON: Scope, rebuttal case.

7 MS. GRISWOLD: I can proffer at sidebar.

8 MR. JACKSON: Go ahead. He can answer the question.

9 I withdraw my objection.

10 THE COURT: All right.

11 A. Yeah, he told me he had a little bit of programming
12 experience, but he was more of the kind of Steve Jobs type or
13 leader, marketing voice of the company.

14 Q. You testified during your trial that you spoke to Irfan
15 Amanat prior to investing in Enable, is that correct?

16 A. That's correct.

17 Q. And in the course of that conversation, did you discuss the
18 Enable strategy?

19 Let me withdraw that.

20 What, if anything, did Mr. Irfan Amanat tell you about
21 his professional background in that conversation?

22 A. He told me he was very proficient as programming software,
23 and I know that he had worked -- I believe he told me that he
24 had worked -- and Omar also told me that he worked with Omar at
25 that initial firm that he had sold to E-Trade as well.

HCKTTUZ5

Maiden - Cross

1 Q. Mr. Maiden, do you have any idea what other testimony or
2 evidence the government has offered in connection with these
3 four emails I asked you to testify about today?

4 A. No.

5 MS. GRISWOLD: No further questions.

6 MR. JACKSON: Can I try to get two or three minutes
7 in, Judge?

8 THE COURT: All right.

9 CROSS-EXAMINATION

10 BY MR. JACKSON:

11 Q. Mr. Maiden, you testified in this case -- your
12 cross-examination in this case was occurring on November 7,
13 right?

14 A. That sounds right.

15 Q. And it wasn't until December 3rd that you first said
16 anything to anyone suggesting that the emails that you looked
17 at were not emails that you received, right?

18 A. Because I hadn't read them.

19 Q. Sir, it's a yes or no question. It wasn't until
20 December 3rd, right?

21 A. Right.

22 Q. Almost a month passed by, correct?

23 A. Correct.

24 Q. And during that time, you didn't reach out to the
25 government, right?

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Maiden - Cross

1 A. How can you do that on something you haven't read?

2 Q. Sir, during that time you didn't reach out to government,
3 correct?

4 A. That's correct.

5 Q. You didn't reach out to anyone else and ask them to contact
6 the FBI, right?

7 That's a yes or no question.

8 A. Correct.

9 Q. So the fact of the matter is during the testimony you
10 actually read from portions of the emails that we're talking
11 about, right?

12 That's a yes or no question.

13 MS. GRISWOLD: Objection. To what testimony?

14 Q. During your cross-examination you read from some of the
15 emails that you were just looking at, right?

16 A. I would say I glanced at them.

17 Q. But you also read portions aloud to the jury, correct?

18 A. I did.

19 Q. And after your testimony ended, you had a conversation, a
20 brief conversation with the prosecutors, right?

21 A. After -- yes, that's correct.

22 Q. And they told you you had done a good job, right?

23 A. Right.

24 Q. And then you continued to think about your testimony after
25 you got off the witness stand, right?

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1 A. I'm sure I did, yes.

2 Q. You actually wrote a letter to Jamie Yavelberg about your
3 testimony, didn't you?

4 MS. GRISWOLD: Objection.

5 THE COURT: That's a yes or no.

6 A. I did, yes.

7 Q. And when you communicated to her, you did not say you
8 thought that you had been shown some emails that were not
9 authentic, right?

10 A. That's because I hadn't read them.

11 Q. You did not say that, did you?

12 A. No, I did not say that.

13 MR. JACKSON: Your Honor, this may be -- I don't want
14 to overstay the jurors' time, but I defer to the Court.

15 THE COURT: Well, how much more do you have,
16 Mr. Jackson?

17 MR. JACKSON: I think I could complete the cross in
18 approximately ten to fifteen minutes.

19 THE COURT: I leave it to the jury. Can you stay ten
20 to fifteen minutes or do people have obligations?

21 JUROR: I can't.

22 THE COURT: All right. Then ladies and gentlemen, we
23 will break for the day. Don't discuss the case, keep an open
24 mind. We'll resume at 9:30 tomorrow. Thank you all very much.

25 (Jury not present)

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1 THE COURT: I'm going to bring Ms. Charlton to the
2 sidebar now.

3 (At sidebar, juror present)

4 THE COURT: I have your note about your trip, which
5 you told us about a long time ago --

6 JUROR: I'm sorry.

7 THE COURT: -- and we all had it in mind. But first
8 of all, I wanted to tell you that yes, I will excuse you today,
9 but more importantly I wanted to tell you how much I appreciate
10 your service. I know it imposed a burden on you. I know all
11 the lawyers join me in thanking you for your service, the care
12 with which you observed the testimony and the evidence. We're
13 sorry that because of prescheduled travel you won't be
14 continuing with us. We are coming to the end --

15 JUROR: I know.

16 THE COURT: -- and we all very much wish you could
17 participate, but you told us about this flight when we were in
18 jury selection, and it was the belief of everyone here we would
19 be done by now, and unfortunately that's not the way it turned
20 out. So I didn't want you to leave without knowing how much we
21 all appreciate your service.

22 JUROR: Thank you.

23 THE COURT: And we all wish you well.

24 JUROR: Okay. Thank you. This has been an
25 experience, to say the least. Happy holidays.

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1 THE COURT: Thank you.

2 (In open court)

3 THE COURT: So Mr. Jackson, you have some additional
4 questions for Mr. Maiden, and is there any redirect of Maiden?

5 MS. GRISWOLD: Not currently, your Honor. I tried to
6 keep the direct as short as possible. I do -- I guess we are a
7 little concerned about how far Mr. Jackson may try to go into
8 the Yavelbergs. I understand the question that he asked about,
9 but we think anything beyond what has been established is
10 beyond the scope and irrelevant. But I don't currently
11 anticipate any redirect based on what I heard at the hearing or
12 what I heard so far today.

13 THE COURT: Any other questions about Ms. Yavelberg?

14 MR. JACKSON: I don't think any others are necessary,
15 Judge.

16 THE COURT: Okay. Does the government have any other
17 evidence or is this going to be it?

18 MS. GRISWOLD: It is my intention that this is it.

19 THE COURT: Mr. Jackson, anything you want to say?

20 MR. JACKSON: Judge, I want to let the Court know I
21 plan on putting on a very short responsive case to what they
22 have done. I would like to try to reach some stipulation with
23 the government tonight to accelerate that process. I intend to
24 call Ms. Rosen for very brief testimony to describe some
25 functionality issue at one of the hearings of the Yahoo account

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1 and to introduce some documents that I think are relevant to
2 the analysis here, but that's about it. If we could agree on
3 those documents, I think that should be extremely brief
4 testimony. So I will have a discussion with them after Court.

5 I will say, your Honor, I don't know if this is the
6 appropriate time or if the Court had other things, but I did
7 want to lodge my objection to Special Agent DeCapua.

8 THE COURT: Go ahead.

9 MR. JACKSON: Your Honor, I think the Special Agent
10 DeCapua is obviously a very diligent agent. I'm not casting
11 aspersions on him. I think he performed his duties apparently
12 to best of his ability.

13 I'm deeply troubled that we're hearing the complexity
14 of the calculations that Special Agent DeCapua did regarding
15 what he says are hundreds of additional messages that go to
16 what he testified he observed here, and there may be a text
17 file that represents these calculations and we didn't get it.

18 What we were forwarded in terms of 3500 material for
19 Special Agent DeCapua was very limited. And I will just note,
20 your Honor, to the extent that the times are not exact with
21 regard to -- to the extent the times are not exact with regard
22 to any of the messages that Special Agent DeCapua is analyzing,
23 there's a Brady issue, Judge, that's Brady material, the times
24 were off by any amount of time. And what I heard today was the
25 first time I heard Special Agent DeCapua say that he found that

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1 the times were the same within a degree of approximation. That
2 was not his testimony at the hearing the other night.

3 THE COURT: Well, he indicated -- no, I disagree with
4 you on that. He indicated at the hearing that the times were
5 not exact, they did not match up exactly. I think it's fair to
6 say that he indicated that they matched up closely, but he was
7 very clear -- my recollection is at the hearing that there was
8 a lag between the time that was on the date that -- the time
9 that was reflected on the date time column and the time that
10 was reflected in the timestamp conversion column.

11 MR. JACKSON: Judge, I would concede the Court's
12 memory on all these issues is better than mine, I'm managing a
13 lot of things here, but I hadn't heard him articulate this
14 way -- this idea of within an approximation. For a minute I
15 thought maybe he was talking about a second off or a couple of
16 seconds off, but if there's anything more than that, minutes or
17 hours, or days, I don't know, I haven't seen any of the
18 calculations, and frankly, he's an incredibly diligent agent,
19 it seems odd to me that he would not keep any --

20 THE COURT: It may seem odd to you, it didn't strike
21 me as odd. This all occurred under very, very stressful, rapid
22 circumstances. As you brought up before the jury, the first
23 time he even did this -- the first time he came up with this
24 particular analysis was, what did he say, two days ago?

25 MR. JACKSON: That's correct, Judge.

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1 THE COURT: So I'm sure if it had come up a year ago,
2 there would be a lot more material, but he had a very limited
3 amount of time to do what he had to do. And in fairness, the
4 government had initially approached this through its
5 determination that it was going to rely on --

6 I will get the date wrong -- May 9?

7 MS. GRISWOLD: May 8, 2009.

8 THE COURT: -- May 8, 2009 email that was sort of the
9 centerpiece on this case on the fabrication issue. And they
10 had a number of arguments about why they thought that email was
11 fabricated, and to some extent their whole line of attack on
12 this point was predicated on this email. And as you know, I
13 excluded the email that had been the centerpiece of their
14 presentation because of a concern that it would unfairly
15 prejudice Mr. Tuzman. It was in that context. And this was,
16 of course, not shared with the jury.

17 So the way it was presented to the jury is that for
18 some unexplained reason Agent DeCapua decided he would have to
19 conduct a completely different type of analysis in the last two
20 days, one could argue that was very unfair, the way that came
21 out, because the reason why he was forced to do that is because
22 of an evidentiary ruling that I made in order to protect a
23 co-defendant.

24 But in any event, while you were surprised he didn't
25 have more written materials, it doesn't surprise me given the

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1 circumstances under which all of this arose.

2 MR. JACKSON: Your Honor, I appreciate the Court's
3 analysis, and I don't disagree. That's why I was careful to
4 say at the beginning I don't think Agent DeCapua did anything
5 wrong in terms of way he responded to it. I don't think my
6 question was unfair because I wasn't trying to create a
7 misimpression. He had been looking at these emails as well
8 since the beginning, so I wanted to emphasize the recency here
9 in terms of the analysis, and the limited amount of time that
10 this had been examined and all the things he had not looked at.

11 Whether there is a 3500 or Brady issue, your Honor --

12 THE COURT: Do you have an application? He said he
13 wasn't sure whether he had maintained any records regarding the
14 message IDs that he had examined with respect to the other
15 Blackberry messages on the point of this time lag between the
16 column marked date time sent and the column marked timestamp
17 conversion. Do you have an application?

18 MR. JACKSON: Yes, your Honor, my application is if it
19 exists, it be turned over to us.

20 THE COURT: What does the government say?

21 MS. GRISWOLD: We'll find out if it exists. And I
22 note for the record that the analysis was all done on data on
23 Mr. Maiden's computer that has been turned over as Rule 16
24 discovery, so any scripts or things that were run could be run
25 based on that data. But of course we will check.

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1 THE COURT: The underlying data has been available --
2 well, was provided to the defense many, many, many months ago.

3 MR. JACKSON: I agree with that, Judge. I don't think
4 that's responsive, respectfully. I don't think it's responsive
5 to the question of whether or not if he has done additional
6 work on that data, we should have access to it to see it before
7 he testified.

8 THE COURT: And they will inquire if there is any --
9 and I don't know what the technical term is, but whatever it
10 is, if there is anything that reflects work he did on the time
11 lag issue, they will ask him if that exists and they will
12 provide it to you if it exists.

13 MS. GRISWOLD: Yes, your Honor.

14 MR. JACKSON: The last thing I will say about Special
15 Agent DeCapua, when we leave court today I will be mostly
16 focused on my summation. I will take a little bit of time to
17 consider whether or not we're going to file any motion for
18 relief related to Special Agent DeCapua's testimony, because
19 while I believe that the agent had -- I don't want to suggest
20 anything, I don't believe the agent was intending to say
21 anything inaccurate, I don't think the agent was -- I think the
22 agent was intending to provide accurate testimony. But I think
23 his testimony was factually incorrect with regard to several
24 very important concepts, and I think it completely undermines
25 the appropriateness of his testimony from a 702 perspective.

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1 I'm going to explore that a bit, and I may put in a filing to
2 the Court on it to explain in more detail what I'm talking
3 about.

4 The witness -- I will give two brief examples. The
5 witness indicated that a UUID always appears in basic 16, what
6 he described as hexadecimal format. That is not true. There
7 is abundant --

8 THE COURT: Well, without getting into the details of
9 whether it's true or not, he testified to that at the hearing,
10 so you have known for some time that that was his position.
11 And so if you thought it was wrong or incorrect, as you're
12 saying now, then presumably the expert that you retained on
13 this issue could testify that Agent DeCapua is wrong.

14 In other words, my point is it wasn't -- it could not
15 have been a surprise to you that he testified in the fashion he
16 did about UUIDs, because he testified to that before.

17 MR. JACKSON: Right. He testified to that.

18 THE COURT: So to the extent he was wrong on that
19 point, you knew he was wrong, or you had a basis for your
20 belief that he was wrong after he testified at the hearing
21 outside the presence of the jury.

22 MR. JACKSON: Well, your Honor, just to be clear on
23 the record, I didn't develop the basis for concluding that he
24 was wrong until about 4:00 a.m. last night. This is an issue
25 that over the last 48 hours I have been researching pretty

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1 extensively trying to understand it, and while we have been
2 dealing with a number of other legal issues. But I believe he
3 was wrong. I don't have available to me, I don't believe, an
4 expert who is capable of addressing that particular issue. So
5 it may be this is not something that can be explored in a way
6 that makes sense, I just want the Court to know that I am
7 contemplating putting in a filing that tries to explain why I
8 think the agent was generally wrong on certain of his issues,
9 and I'm processing it and understanding it, but I'm notifying
10 the Court.

11 MS. GRISWOLD: To complete the record, we note there
12 was an opportunity provided to Mr. Jackson to come this morning
13 at 9:00 a.m. if he had any additional cross questions in the
14 context of whether or not this witness could be qualified under
15 702, and we were told he didn't have any. There was no
16 objection to him being qualified.

17 MR. JACKSON: You're right, I didn't ask for an
18 opportunity for additional questioning on it, but that doesn't
19 end the questioning. The questioning is whether or not the
20 testimony that actually came in during the trial was
21 appropriate testimony.

22 I think we need to look at the legal standards
23 associated with this. We need to look at what the facts are
24 that we can actually demonstrate or not demonstrate, and then
25 we'll make termination. But I don't -- I'm not trying to

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1 suggest that anyone did anything inappropriately, I think
2 everyone was responding as diligently as they can. I am just
3 flagging the issue that I want the Court to know that I'm
4 taking a look at tonight and I may put in a submission on.

5 THE COURT: All right. So can I assume that whatever
6 additional testimony there will be will be completed in an
7 hour's time or is it going to take longer than that or what?

8 MR. JACKSON: Yes, your Honor.

9 THE COURT: Okay. So in what order are the defense
10 summations going to be?

11 MR. McRAE: Your Honor, could we have a moment to
12 confer with Mr. Jackson?

13 THE COURT: Sure.

14 (Pause)

15 MR. McRAE: Your Honor, thank you for allowing us to
16 confer. Your Honor, I think that at this point there are a
17 couple of data points that we don't have with respect to
18 tomorrow as far as the defense closings. Here are a couple of
19 the issues: We know we're going to take a break at I believe
20 it is 1:30 to accommodate one of the jurors, so that will be
21 1:30 to 2:30. We also don't know at this point, even though
22 Thursdays on our new schedule typically extend to 3:30, whether
23 we're going to go past that point. I don't know if the jury
24 has been polled on that question. I'm not asking the Court
25 that, I'm just noting that it's a factor.

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1 THE COURT: Well, we asked them to say until 5:00, the
2 answer came back no.

3 MR. McRAE: So I don't know if there's some
4 intermediate point of 4 o'clock, et cetera. Again, I'm not
5 asking the Court for an answer on that, I'm pointing it out for
6 this reason: Working backwards from whenever the testimony of
7 Mr. Maiden, as well as the case, the affirmative case of
8 Mr. Jackson's client ends, it would seem that even if we moved
9 forward with the two-hour chunk of the government's opening
10 closing, that someone's closing is going to be interrupted as
11 much as -- if it's a two-hour time limit that we have, you
12 might get into 20 minutes of it, have a break for an hour, and
13 maybe not even be able to finish it with the time that we have
14 left.

15 And so we want to be responsive to the Court,
16 obviously, we know that the Court needs to know this, but we
17 just want to be completely transparent that some of the things
18 that we're trying to figure out is, based on some of these
19 interminate points, how much interruption is there going to be,
20 and can defense counsel confer amongst themselves once we
21 understand that to see, essentially, if there is going to be an
22 interruption or a break, who is willing to have that or whether
23 there are alternatives where none of us have to have that
24 interruption?

25 So I'm just being as real-time and transparent as I

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1 can, your Honor. And the reason why, obviously, it's a
2 concern, is you can imagine if someone starts a closing, they
3 get ten minutes into it, 15 minutes into it, understandably we
4 want to accommodate the jury, that's not the issue, but if you
5 have to break for an hour and come back in and still not finish
6 your closing, it's obviously very disruptive, and there's a
7 concern about dilution of it and carrying over to the next day
8 and whether people remember it and so on and so forth. It's
9 obviously better to be able to get an entire chunk where you
10 could finish it. So if that's a reality, then we have to
11 confer amongst each other as to who is going to have that
12 happen or whether there's another way to deal with it.

13 MR. WILLIAMS: Your Honor, we have no objection to
14 them conferring about what order they want to go into, but I
15 think there should be no question that, given where we find
16 ourselves, on the Eve of Christmas, pretty much, that we have
17 to use every second of available jury time that we have left.

18 And so we all expect that our summations are going to
19 get broken up, and that's just the way it's going to be. So
20 whether or not the government's summation gets broken up or the
21 defense summation gets broken up, I want to be clear that the
22 government would object to anything other than all parties
23 plowing through using every second of available jury time until
24 we're done.

25 MR. McRAE: Your Honor, one other quick point. It is

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1 my recollection, and obviously the record will determine if
2 it's accurate, that we, being counsel of Mr. Isaza Tuzman, went
3 first after the government's opening. Obviously we would
4 prefer, if we are going to have these interruptions, that we do
5 our closing on behalf of our client the following day, so that
6 would optimize the chance that we don't have any interruption.
7 And obviously I know that's what the Court wants us to confer
8 about, and we will do that, I'm just stating what our
9 preference will be. But we will, of course, confer with
10 Mr. Jackson as we work these issues out.

11 MR. JACKSON: Your Honor, I have a great relationship
12 with my co-counsel, co-defendant's counsel here, but the fact
13 of the matter is our preference -- our strong preference also
14 is to go second, which is the order of caption, the order in
15 which we have done most things in this case. I think it's what
16 make sense.

17 And I also note that I have tomorrow to complete a
18 cross of Mr. Maiden and put on a piece of a direct case, so to
19 whatever extent it makes sense for anyone to have a little bit
20 of additional time, I'm not going to be able to completely
21 focus on the summation tonight, I have to finish the rest of
22 the case. That's my piece.

23 (Continued on next page)
24
25

HckWtuz6

1 THE COURT: To state the obvious, I think it's highly
2 likely that one defense lawyer is going to have to give part of
3 their summation tomorrow. That should be obvious.

4 Understanding that it's been impossible to really
5 predict timing here, and estimates have just been worthless, I
6 guess I come into this thinking that it seems likely that the
7 evidence will be over by 11. If you assume that the evidence
8 is going to be over by 11, that would seem that the
9 government's summation could go from 11 to 1, and then allowing
10 for slippage and so forth, we're going to get to 1:30.

11 To the extent, Mr. McRae, you expressed a concern
12 about having to go ten minutes, I'm not going to make you do
13 that, but I do want to make clear that at 2:30 we have an hour
14 left in the day, and we will inquire. As soon as I can find my
15 deputy, I'll find out whether he knows of any flexibility with
16 respect to the 3:30 time. Unfortunately, I suspect the answer
17 is no, but we will certainly explore that. And if there's any
18 way we can get in a full defense summation, I'll do that. But
19 if what it means is that we do one hour on Thursday and one
20 hour on Friday morning, that's just the way it's going to have
21 to be; I can't waste the hour. That's as much as I can tell
22 you.

23 I do think we need to have a charge conference now. I
24 actually would like to take a little more time to finish the
25 last few pages so I can give you a complete draft charge.

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1 I will say in response to your point, Mr. Weitzman,
2 about additional instructions with respect to market
3 manipulation, we did obtain the charge that the government made
4 reference to in the case before Judge Carter. It was not
5 illuminating. We didn't find language anything like the
6 language that you submitted in Judge Carter's charge. I'm
7 happy to look at any other charges that anyone else has
8 involving market manipulation, but the charge from the Durante
9 case that the government mentioned was not illuminating on the
10 point.

11 Mr. Ruocco, I had a question for you.

12 Can we resume at 4:00 for the charge conference?

13 MR. WEITZMAN: Yes, your Honor.

14 MR. JACKSON: Yes, your Honor.

15 THE COURT: OK.

16 (Recess)

17 THE COURT: Please be seated.

18 With respect to the first, I guess, 60 pages, it's not
19 much different than what you already had. I added venue
20 language in after the elements of each count I discussed.

21 With respect to Count Four, I have added language
22 addressing market manipulation, so that's different than what
23 you've seen before.

24 MR. JACKSON: Excuse me, your Honor. It might be
25 helpful, if it's possible, if Mr. Smith, as we're sitting here,

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1 could also send us an electronic copy.

2 THE COURT: Sure. Absolutely.

3 What I would propose is that we sort of walk through
4 this and I'll take your comments page by page. And everybody
5 can feel free to remain seated. Pull the microphone up and
6 just walk through this.

7 MR. WEITZMAN: Yes, your Honor.

8 THE COURT: Go ahead, Mr. Weitzman.

9 MR. WEITZMAN: Page 3, first full paragraph, it
10 states, "It is for you alone to decide whether the government
11 has proven the defendants are guilty." I think in every other
12 case, for the most part, we say either "the defendant you are
13 considering" or "the respective defendant," something that
14 separates the defendants, because it's not a joint
15 determination. I would say "either of the defendants guilty"
16 or "the defendant you are considering."

17 THE COURT: All right. I'll change it to "the
18 defendant you are considering."

19 What's next?

20 MR. NAFTALIS: My first comment is a nit on page 20.

21 THE COURT: Page 20?

22 MR. NAFTALIS: Through 21. You just have to close the
23 quote in the second paragraph after "wire fraud."

24 THE COURT: Yes. Thank you.

25 What's next?

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1 MR. WEITZMAN: Yes, your Honor. I'm sorry. I have a
2 comment before page 20. It's page 9, "specific investigative
3 techniques."

4 THE COURT: Yes.

5 MR. WEITZMAN: We had a specific request on this that
6 relied on the Supreme Court's decision in Kyles v. Whitley, on
7 page 32 of our request to charge. The request is that we add:

8 "You are entitled to evaluate the quality and
9 thoroughness of the government's investigation. For example, a
10 conscientious investigation may enhance in your mind the
11 credibility of the evidence put before you. In contrast, a
12 sloppy investigation may diminish the credibility of that same
13 evidence. You may consider these facts in perceptions of the
14 quality of the government's investigation in deciding whether
15 the government has met its burden of proof." And we cite Kyles
16 and in Kyles --

17 MR. NAFTALIS: What page are you on of your charge?

18 THE COURT: He's citing page 32 of his requests to
19 charge.

20 MR. WEITZMAN: In the majority opinion of Kyles v.
21 Whitley, the Supreme Court said: "When, for example, the
22 probative force of evidence depends on the circumstances in
23 which it was obtained, and those circumstances raise a
24 possibility of fraud, indication of conscientious police work
25 will enhance probative force and slovenly work will diminish

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1 it."

2 MR. NAFTALIS: Your Honor, we object to that. I'm not
3 familiar with that. You obviously have more experience than
4 any of us do, but I've never seen that instruction given.

5 MR. WEITZMAN: There has been a lot of evidence, your
6 Honor, about the quality of the investigation. I think it's
7 not something that the jury has to categorically ignore.

8 MR. NAFTALIS: Your Honor, I think it's argument they
9 want to make, but I don't know if it should be in a jury
10 instruction.

11 THE COURT: Yes. My problem with it is, I mean, I
12 understand the basic point that if an investigation's sloppy,
13 that may lead to a jury finding that the government hasn't met
14 its burden, but I don't want to communicate to the jury that
15 their function here is as an arbiter of the thoroughness of the
16 government's investigation. What I've tried to keep them
17 focused on is whether the government has proven the elements of
18 each crime beyond a reasonable doubt, because I believe that's
19 actually what their function is.

20 I believe that the criticisms of the government's
21 investigation are perfectly fair ground for argument, but I
22 don't believe it's something that needs to be in the charge,
23 because it tends to shift the focus from whether the government
24 has met its burden of proving the elements of the crime beyond
25 a reasonable doubt. It tends to shift the focus from that to

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1 whether the government did a thorough investigation or should
2 have pursued other avenues, or perhaps shouldn't have relied on
3 the cooperators it relied on. That to me is all for argument,
4 so I'm not going to add the language that you suggest, Mr.
5 Weitzman.

6 MR. WEITZMAN: OK. And this is a semantic issue,
7 perhaps, but on page 11, there's a reference to, in one of the
8 bullets, "the manner of the witness while testifying."

9 THE COURT: Yes.

10 MR. WEITZMAN: I found that very confusing, "the
11 manner." I thought maybe "manner and demeanor."

12 THE COURT: What paragraph was that in?

13 MR. WEITZMAN: Actually, it's on page 10 of the new
14 charge, so the second-to-last bullet.

15 THE COURT: OK. "The manner and demeanor"?

16 MR. WEITZMAN: Yes.

17 THE COURT: All right.

18 MR. WEITZMAN: Page 13.

19 THE COURT: Yes.

20 MR. WEITZMAN: Actually, let me see if it's the same
21 page in the new charge.

22 Yes, at the top of page 13, it says, "You are not to
23 draw any conclusions or inferences of any kind about the guilt
24 of the defendants merely from the fact" -- I think the
25 insertion of the words "the guilt of the defendants" is

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1 one-sided, so I would just propose "of any kind about the
2 defendants merely from the fact."

3 THE COURT: I don't have a problem with that. It will
4 just say, "You are not to draw any conclusions or inferences of
5 any kind about the defendants merely from the fact that certain
6 witnesses at the trial entered into cooperation agreements with
7 the government or pleaded guilty to crimes," etc.

8 MR. WEITZMAN: Page 15.

9 MR. NAFTALIS: I'm fine with it, but I actually think
10 it's better for the defense if you leave "guilt" in because the
11 idea or thought is that you can't infer that the defendants are
12 guilty because the cooperators pled guilty. So I think it's a
13 better instruction if it's "guilt of," but we don't object.

14 THE COURT: I agree with you. I agree with you
15 entirely. I think it's better for the defense if it says
16 "guilt," but if they want "guilt" out, I'll take it out.

17 MR. JACKSON: Sorry, Judge. I was trying to follow.
18 Can I just hear exactly what the proposal is more clearly?

19 THE COURT: Yes. As amended by Mr. Weitzman, the
20 statement would read: "You are not to draw any conclusions or
21 inferences of any kind about the defendants merely from the
22 fact that certain witnesses at this trial entered into
23 cooperation agreements with the government or pleaded guilty to
24 crimes that may be similar or related to the crimes with which
25 the defendants are charged."

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1 MR. JACKSON: I think that there might be a middle
2 ground, because we do like the language the Court has, but I
3 appreciate Mr. Weitzman's concern. Perhaps if it says
4 "inferences of any kind about the guilt or innocence of the
5 defendants merely from the fact that certain witnesses at this
6 trial entered into cooperation agreements."

7 THE COURT: Are you happy with that? I don't like it.

8 MR. WEITZMAN: I actually don't like it.

9 THE COURT: Yes, because it suggests there's a burden
10 on the defendants.

11 MR. WEITZMAN: And they may make a finding, and also
12 because we will be arguing that those cooperation agreements
13 actually make them unreliable witnesses.

14 THE COURT: All right.

15 MR. WEITZMAN: You know what, if Mr. Jackson prefers
16 the words about the guilt --

17 Is that your preference?

18 MR. JACKSON: That is my slight preference, just
19 because I'm familiar with that charge.

20 MR. WEITZMAN: How about "regarding whether or not" --
21 you know, I think it becomes cumbersome, actually, your Honor.
22 I defer to Mr. Jackson. He's an exceptional lawyer.

23 THE COURT: Do you want to go back to the way it was
24 originally?

25 MR. WEITZMAN: Yes, your Honor.

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1 THE COURT: OK. We will do that.

2 Next.

3 MR. WEITZMAN: Yes. Page 15. There's a reference in
4 the middle of the paragraph, "You may also consider the
5 compensation Professor Ferrell received."

6 THE COURT: Yes.

7 MR. WEITZMAN: I think that it doesn't have to
8 identify him specifically, "compensation, if any, a witness
9 receives," "compensation and benefits" or "benefits, if any, a
10 witness receives." I mean, Agent DeCapua has his job and he's
11 not getting compensated specifically for his testimony here in
12 addition to his compensation, but it's part of his compensation
13 that he has to come to court.

14 MR. NAFTALIS: Your Honor, we're fine with it. We'd
15 actually suggest that that idea go to the bias section so that
16 the idea that any witness is getting compensated, because their
17 travel expert was getting compensated.

18 THE COURT: Their what?

19 MR. NAFTALIS: Their travel expert was getting
20 compensated, though he's not an expert, so the idea that "you
21 may consider the fact that a witness is being compensated for
22 his testimony," we don't care that it identifies a particular
23 witness, but on page 12 is the bias charge.

24 MR. WEITZMAN: I think we are amenable to that as
25 well.

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1 MR. JACKSON: That's fine for me. Thank you.

2 THE COURT: All right. Where precisely would it go?

3 MR. NAFTALIS: I think in the first paragraph and four
4 lines down, "You should also take into account evidence of any
5 benefit," and then I think if you just insert a sentence after
6 there that draws on your Honor's expert compensation, but we
7 just de-expertize it. "You may also consider the compensation
8 a witness received in connection with this case."

9 MR. WEITZMAN: Can we just simplify and say, "You may
10 also take into account any evidence of any compensation or
11 benefit that a witness may receive"?

12 MR. NAFTALIS: That's fine.

13 THE COURT: Now, refresh my memory. Has Ferrell
14 actually been paid anything yet?

15 MR. WEITZMAN: I believe he testified he got
16 compensated \$60,000.

17 THE COURT: OK. I think it would have to say, "You
18 should also take into account any evidence of any benefit or
19 compensation that a witness may or has received."

20 MR. WEITZMAN: Yes, that's fine by us.

21 MR. NAFTALIS: That's fine.

22 THE COURT: OK. And I'll strike the sentence
23 currently about compensation in the "opinion testimony"
24 section. OK? Everybody's fine with that?

25 MR. WEITZMAN: Yes.

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1 MR. JACKSON: Yes, your Honor.

2 THE COURT: All right. What's next?

3 MR. WEITZMAN: Your Honor, we had a specific request
4 regarding our client's high position within the company. It
5 was request No. 27 on page 40. We're not at this point
6 pressing the entire request, but we are continuing to press the
7 first two paragraphs of the request. I'm happy to read it into
8 the record if your Honor would like.

9 THE COURT: I have it in front of me. I was just
10 reading it over.

11 This strikes me as an argument to the jury rather than
12 something that I should instruct them as to the law.

13 Basically, for the record, the language that Mr.
14 Weitzman is requesting is that the jury should take into
15 account the fact that Mr. Tuzman was the chief executive
16 officer and chairman of the company in considering whether he
17 had the necessary knowledge and intent. To me, that's an
18 argument.

19 It's a perfectly valid argument to make to the jury,
20 and it will be made, that Mr. Tuzman was traveling around the
21 world, cutting deals for KITDigital, and he wasn't paying a
22 great deal of attention to what was happening back in the
23 office, but to me, that's a jury argument, not something that I
24 should be instructing the jury on. So your request is denied.

25 MR. JACKSON: Your Honor, may we circle back to page

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1 17?

2 THE COURT: Sure.

3 MR. JACKSON: At the bottom of the page, instruction
4 23, I just have a question about this. I know that this is a
5 relatively standard instruction in criminal cases. I have a
6 concern that the instruction as written and as applied in this
7 case could create some confusion for the jurors given that we
8 are dealing with a situation where we have multiple counts
9 involving different defendants and very specific time periods
10 that relate to the charged conduct as opposed to uncharged
11 conduct. I think that there is an appropriate variation in
12 dates charge to be given, but I think that where we are now, I
13 would propose that the second sentence in this be altered.

14 Right now it says, "The indictment in this case refers
15 to various dates." I would propose striking "it does not
16 matter if the indictment states the specific conduct is alleged
17 to have occurred on or about a certain date and the evidence
18 indicates that, in fact, it was on another date."

19 I think that the third sentence is correct, "The law
20 only requires a substantial similarity between the dates
21 alleged in the indictment and the dates established through
22 evidence at trial." I would request, your Honor, a sentence in
23 between those that says, "the precise dates that are listed in
24 the" -- "the precise dates in the indictment" -- I'm sorry.

25 I think you should say: "The evidence need not

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1 demonstrate that specific conduct occurred on the precise dates
2 identified in the indictment. However, the alleged dates of
3 the charged conduct should serve as a general indication of the
4 government's allegation."

5 THE COURT: Why doesn't the third sentence in the
6 current version do what you want?

7 MR. JACKSON: You know what, Judge, I think you're
8 right. That's fine.

9 THE COURT: What you're saying is you want the second
10 sentence struck?

11 MR. JACKSON: Yes, if we just have the first and the
12 third, that's great.

13 THE COURT: I have some sympathy with that position,
14 because unlike many cases where dates are often not all that
15 critical, here, the defendants have certain arguments that are
16 predicated on the time periods that are charged in the
17 indictment, and so I'm a little concerned about saying
18 essentially the dates mentioned in the indictment don't matter
19 at all, feel free to ignore them. I don't think that that's
20 appropriate in this case.

21 I don't think that anything is lost in this case by
22 taking out the second sentence, but what does the government
23 say?

24 MR. NAFTALIS: Your Honor, I think we'd leave the
25 second sentence because it connects the idea. We all

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1 understand what this charge is and what the relationship to the
2 indictment is and what they have to find, but since you're
3 going to be reading the indictment to them, I think it's
4 helpful for them to understand that the indictment says between
5 X and Y; it doesn't matter what the indictment says. It
6 matters what the evidence shows. It just has to be a
7 substantial similarity. It helps to link them.

8 MR. JACKSON: It does matter what the indictment says.

9 Your Honor, I think my sentence as proposed got a
10 little clumsy, but we might be able to respond to Mr. Naftalis'
11 concern with a shorter sentence which just says, "The
12 government's not required to prove the precise dates; the law
13 only requires a substantial similarity between the dates
14 alleged in the indictment and the dates established through
15 evidence at trial."

16 I think that that protects the government's interests
17 and it also puts a finer point on the fact that what we're
18 really telling the jurors is, Look, if it's March 10 or March
19 9, it doesn't matter, but substantial similarity means we can't
20 be talking about a different year. I really think it's much
21 less than that in a case like this where there are very
22 specific allegations about when the conspiracy started.

23 THE COURT: All right. What do you say to that? Just
24 so it's clear, paragraph 23 would read as follows:

25 "The indictment in this case refers to various dates.

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1 The government is not required to prove that conduct took place
2 on the precise dates alleged in the indictment. The law only
3 requires a substantial similarity between the dates alleged in
4 the indictment and the dates established through evidence at
5 trial."

6 Is that OK with the government?

7 MR. NAFTALIS: Yes, your Honor.

8 THE COURT: All right. I'll strike that second
9 sentence and substitute the sentence I read in its place.

10 Next.

11 MR. WEITZMAN: Your Honor, my next edit is on page 24,
12 the description of Count Five.

13 MR. NAFTALIS: We have something on page 22.

14 THE COURT: OK. Page 22, did you say?

15 MR. NAFTALIS: Yes.

16 THE COURT: OK.

17 MR. NAFTALIS: This is at the bottom of the top
18 paragraph, where there's the "to wit" clause, and this brings
19 up one of the issues that I think Mr. Jackson raised at some
20 point during the trial.

21 THE COURT: I'm sorry. I'm not finding it. Is this
22 Count Three we're talking about?

23 MR. NAFTALIS: This is Count Two.

24 THE COURT: Count Two, OK.

25 MR. JACKSON: I'm sorry, Mr. Naftalis. Could you

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1 remind me what paragraph you're at?

2 MR. NAFTALIS: The top paragraph, line 2 of the top
3 paragraph, where it says "to wit."

4 THE COURT: "To wit," yes. At the top of the page,
5 yes.

6 MR. NAFTALIS: The issue is -- you'll recall that
7 Mr. Jackson took issue with this "to wit" clause.

8 THE COURT: Yes.

9 MR. NAFTALIS: And the issue is that the last clause
10 of this clause refers to the fact that Maiden provided false
11 account statements regarding Maiden Capital's investment in
12 Enable knowing such false account statements were intended to
13 be presented or were presented to Maiden Capital investors.
14 Our theory is that the numbers in the Enable statements were
15 then reflected in the Maiden Capital statements. We don't want
16 to instruct the jury the wrong way. We recognize what the
17 indictment says, but paragraph 34 of the indictment, I think
18 your Honor pointed to during one of the conferences, points out
19 that it's really, you can't read the charge in isolation,
20 because it incorporates the prior paragraph by reference. Our
21 issue is we don't want to leave the misimpression of the
22 theory.

23 THE COURT: Let me just look. I recall this coming up
24 before, but I want to go back to the indictment. What are the
25 applicable paragraphs, Mr. Naftalis?

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1 MR. NAFTALIS: I think it's paragraph, so paragraph 34
2 is the -- just to remind you, paragraph 34 is in the middle of
3 the first count.

4 THE COURT: Yes.

5 MR. NAFTALIS: And then that's incorporated by
6 reference into Count Two.

7 THE COURT: All right. I had in mind a different
8 paragraph that I thought I mentioned at the time this issue
9 came up.

10 MR. NAFTALIS: I think 54 is where the "to wit" clause
11 is that we're looking at. No. Excuse me. That's Count Three,
12 so it's 50.

13 MR. JACKSON: It's paragraph 50, and I think that the
14 Court's instruction as written is correct. That's the actual
15 language in the indictment.

16 MR. NAFTALIS: The "to wit" clause is not -- it's an
17 exemplar. It's not really the charging language.

18 MR. JACKSON: I don't think that that position finds
19 support anywhere in the law. The "to wit" clause is the key
20 charging language.

21 MR. NAFTALIS: It puts them on notice, but the
22 charging language, Mr. Williams will address the letter, but --

23 THE COURT: There's another paragraph that I mentioned
24 at the time this issue came up, which sets forth the theory not
25 that Maiden gave Enable account statements to his clients.

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1 MR. NAFTALIS: Right.

2 THE COURT: But rather that the information contained
3 in those statements was given to the clients, and so when this
4 issue came up, and Mr. Jackson cited probably paragraph 50, I
5 said, Yes, but there's another paragraph where they make it
6 clear that it's not actually the Enable statements; it's the
7 information in the Enable statements. And now, because the
8 indictment's so long, I can't find it.

9 MR. WILLIAMS: Your Honor, we had thought that was
10 paragraph 34. Maybe we had it wrong, but we had thought that
11 that was the paragraph that we had pointed to in saying how
12 paragraph 50 should then be read in context.

13 MR. JACKSON: Your Honor --

14 MR. WILLIAMS: And if I could just finish.

15 On our objection --

16 THE COURT: No. I think the paragraph that I was
17 alluding to is 35, which says, "After the March 2009 telephone
18 call, Maiden, using fictitious account numbers generated by
19 Irfan Amanat, the defendant, and with the knowledge of Omar
20 Amanat, the defendant, began generating fraudulent client
21 statements that failed to disclose the Enable losses and were
22 distributed to Maiden Capital's investors."

23 MR. WILLIAMS: Your Honor, actually, I don't recall
24 that coming up, but that's actually even more specific,
25 clarifying what the government's theory is.

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1 Our concern is that the charge, which really draws
2 pretty much word for word from paragraph 50, lacks that context
3 from paragraphs 34 and 35, and we're concerned that Mr. Jackson
4 would tell the jury: Look at the charge. It says that these
5 statements were provided to Maiden Capital investors from
6 Enable. You heard no proof of that; therefore, their theory
7 fails, which we don't think would be fair in light of the
8 context that the Court has just cited to.

9 MR. JACKSON: I think they're entirely entitled to
10 argue the separate theory that this was accomplished through
11 Maiden providing fund -- I'm sorry, through Maiden
12 communicating information that he got allegedly from Irfan and
13 Omar, but I just have never heard of the government arguing
14 that the jury shouldn't be instructed on what is specifically
15 alleged in the "to wit" clause.

16 It's a separate discussion than we were having before,
17 which is whether or not there was some additional relief that I
18 was entitled to in terms of discovery because of the fact that
19 there has not been evidence that supports what I thought is
20 very clearly stated in paragraph 50, and I understand the
21 Court's ruling on that, which I think is entirely appropriate,
22 was that based on the context of the entire indictment, one
23 could reasonably infer that false information was not
24 necessarily provided to the government, and therefore, there
25 was no need for further exploration of what information was

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1 supplied to the grand jury and whether there was improper
2 information supplied to the grand jury. I accept and
3 understand that ruling.

4 Now we're in a different place, where the government
5 is saying that the specific language in the "to wit" clause of
6 their own indictment, which they drafted, they should be
7 shielded from having exposure to the jury, and this is the
8 means and methods that they charge and allege. I don't think
9 that they're entitled to craft a new theory.

10 MR. NAFTALIS: Your Honor, I think the issue is that
11 there are two ways, at least, I think, we've seen when you
12 summarize the indictment. It could be Count One charges
13 securities fraud relating to Maiden from X date to Y date that
14 doesn't quote the indictment, and the whole indictment's sent
15 back, which we know is not your practice and we're not pressing
16 that. But to only tell them the charging language gives an
17 incomplete picture of what the theory is how they're actually
18 indicted. We don't think Mr. Jackson's right as to what was
19 presented to the grand jury or what our theory is, but we just
20 don't want to leave the jury with a misimpression as to what
21 the charge is.

22 MR. JACKSON: Then let's just put in some of the
23 language from paragraph 35 and you can make your context
24 argument to the jury.

25 MR. WILLIAMS: This is the point, and your Honor, we

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1 wrote on this in the letter on December 15. Our proposal was
2 to just state specifically, "Count Two charges that defendant
3 Omar Amanat committed wire fraud in connection with an alleged
4 scheme to defraud Maiden Capital investors by causing Stephen
5 Maiden to make material misrepresentations and to omit material
6 facts to Maiden Capital investors about the status of their
7 investments," full stop, without going into the means and
8 methods about having to provide additional context from the
9 indictment. I think everyone agrees that that's the actual
10 charge.

11 MR. JACKSON: No, it is not agreed.

12 MR. WILLIAMS: Well, that's language from the
13 indictment.

14 MR. JACKSON: The language that is quoted at page 22
15 is word for word the language in the indictment. I'm actually
16 quite surprised, because I think the government right now, and
17 I've never heard something like this, the government right now
18 is basically teeing up an explicit violation of the Fifth
19 Amendment. I mean, you cannot run away from the explicit
20 language in the "to wit" clause of an indictment. It's unheard
21 of.

22 MR. WILLIAMS: We're not asking for that.

23 To be clear, I think the issue that we're struggling
24 with is in light of the fact of what the Court had previously
25 said, which is paragraph 50 has to be read in context with the

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1 earlier paragraphs, we can either put in paragraphs 34, 35, and
2 the language from 50 for the full context to be there, or we
3 can truncate the whole thing to have language that doesn't
4 require further explanation to the jury.

5 We just don't want to be in a position where
6 Mr. Jackson is given language in the charge that he can then
7 tell the jury, Look, the government charged this case in one
8 way and their evidence doesn't even match up what they
9 alleged --

10 MR. JACKSON: Of course you don't want that.

11 MR. WILLIAMS: -- which would be wrong in light of the
12 earlier statutory, the language in 34 and 35, which is
13 incorporated by reference into Count Two.

14 THE COURT: I think one way this could be resolved is
15 through adding to the language on 21 and 22 what is pled in
16 paragraph 35. I could add something like, "The indictment
17 further alleges that Stephen Maiden" -- and this is a quote
18 from the indictment, paragraph 35. "The indictment further
19 alleges that Stephen Maiden 'using fictitious account numbers
20 generated by Irfan Amanat, and with the knowledge of Omar
21 Amanat, generated fraudulent client statements that failed to
22 disclose the Enable losses.'"

23 MR. JACKSON: I'm happy with that, your Honor. I
24 think that that would answer all of our concerns if we include
25 that language and leave the current language.

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1 THE COURT: Is the government OK with that?

2 MR. NAFTALIS: Your Honor, are you finishing the
3 sentence or stopping at "losses," from 35? "And were
4 distributed to Maiden Capital investors."

5 THE COURT: I might need to fix the grammar a little
6 bit, but --

7 MR. NAFTALIS: In concept, that's fine.

8 THE COURT: Are you all right with that, Mr. Jackson?
9 Essentially other than correcting the grammar, and I took out
10 the indictment's references to "the defendant," so I won't be
11 using those, but other than that, I'd be putting that portion
12 of paragraph 35 into the discussion of Count Two on page 22.

13 MR. JACKSON: Yes, your Honor. That's excellent.

14 THE COURT: All right. I will add that.

15 OK. What's next?

16 MR. WEITZMAN: Page 24, your Honor, with respect to --

17 MR. JACKSON: Your Honor, we don't have to address it
18 now; I don't want to cut off Mr. Weitzman, but I do have some
19 significant -- actually, no, your Honor. We can go to 24. I'm
20 sorry.

21 THE COURT: OK.

22 MR. WEITZMAN: With respect to the description of
23 Count Five.

24 THE COURT: Yes.

25 MR. WEITZMAN: We're going to have some significant

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1 comments to the wire fraud instruction generally, but in the
2 first instance, the description of the wire fraud count in the
3 first paragraph under Count Five, which is taken from the
4 indictment, is a confusing instruction that lacks legal merit,
5 which is this.

6 In the indictment they said, "The government claims
7 that Mr. Tuzman," skipping ahead, "defrauded shareholders in
8 KITDigital by failing to disclose that KITDigital's investments
9 in Maiden Capital were not part of an arm's length
10 relationship, but were actually part of related-party
11 transactions."

12 Related-party transaction, both under the rules and as
13 Mr. Halkias defined it, has nothing to do with arm's length
14 relationship. It's about the lack of any economic substance.
15 That's the testimony at trial, actually directly from the
16 accounting standards, and so we cite, in fact, to --

17 THE COURT: Is there a way for the Live Note to work
18 now.

19 Go ahead, Mr. Weitzman.

20 MR. WEITZMAN: Arm's length relationship has not been
21 defined in the case, and it's not part of the related-party
22 test. The related party test that Mr. Halkias testified to,
23 and it's embodied in the related-party rules, is whether the
24 transaction lacked or had economic substance.

25 What we're proposing to then say is, "KITDigital's

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1 investments in Maiden Capital lacked economic substance and
2 were actually related-party transactions entered into for an
3 improper purpose."

4 MR. NAFTALIS: Your Honor, we would disagree with
5 that. I think I noticed that this language changed from the
6 prior draft.

7 THE COURT: The prior draft really didn't give the
8 jury any sense of what the wire fraud conspiracy was.

9 MR. NAFTALIS: Right.

10 THE COURT: It was added to just try to put some meat
11 on the bones about what the crime is that's allegedly been
12 committed.

13 MR. NAFTALIS: It's really by failing to accurately
14 disclose KITDigital's relationship with Maiden Capital, period.
15 So the arm's length, third party, related party, whatever you
16 want to call it, is one example. And then if you keep reading,
17 there's another example. The fact that Maiden Capital wasn't
18 properly disclosed, the \$250,000 investment is another example,
19 so it's not just -- we're looking in the indictment, paragraphs
20 78, 79, 80.

21 THE COURT: What I'm trying to say in this paragraph,
22 Mr. Weitzman, is this is what the government claims is set
23 forth in the indictment. Now, I understand you say, Well,
24 Judge, that's not actually what the evidence showed. OK,
25 that's an argument to make to the jury, but I'm not sure it's

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1 an argument to make to me about what the indictment says,
2 because the indictment does say that. It's essentially a quote
3 from the indictment. It is a quote from the indictment, and I
4 probably should have it in quotes.

5 MR. WEITZMAN: I understand that, and when we get to
6 the wire fraud instruction, I have some very specific requests,
7 because I think that under binding Second Circuit law, failure
8 to disclose a relationship, just any relationship between
9 parties, for example, is not a wire fraud and cannot be a wire
10 fraud unless the omission of material fact concerns an
11 essential element of the bargained-for exchange. And I'll
12 provide that in greater detail.

13 My concern is that when you're quoting the
14 indictment's language here, the suggestion is that merely
15 because there's a relationship between Maiden and my client
16 that's undisclosed, that constitutes a wire fraud, and I don't
17 think that the law would support that. And I can walk through
18 why.

19 THE COURT: Again, you're missing the point. This
20 isn't a statement of what the law is. It's a statement of what
21 the government charged.

22 MR. WEITZMAN: That's fair. I see that now, your
23 Honor, and we can certainly address my other comments about the
24 law, I guess, in the wire fraud instruction.

25 THE COURT: All right.

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1 MR. NAFTALIS: Your Honor, our issue is that the
2 related party, we understand it's from the indictment, that's
3 just one example of the failure to accurately disclose the
4 nature of the transactions that KITDigital had with Maiden
5 Capital, so 79 and 80 are other examples.

6 THE COURT: All right. What do you propose? It
7 sounds, then, like you want me to add language. What do you
8 want me to add?

9 MR. NAFTALIS: Let me just read 79 and see if I can
10 come up with a shorter way to say it.

11 I think the bottom four lines of paragraph 79,
12 "Furthermore, the government alleges that Mr. Tuzman falsely
13 represented to KITDigital's shareholders that the \$250,000 --"

14 THE COURT: But I haven't made any reference yet to
15 the 250.

16 MR. NAFTALIS: How about, "failed to disclose to
17 KITDigital the \$250,000 investment made by KITDigital with
18 Maiden Capital," period.

19 This is the one, your Honor will remember, where
20 Mr. Tuzman wants his money back, his personal money, so he has
21 KITDigital put in 250,000, and then Maiden sends him back
22 280-something.

23 THE COURT: Right.

24 MR. NAFTALIS: So he is defrauding the company by
25 basically substituting his money for KITDigital money.

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1 THE COURT: I remember the incident. I'm just asking,
2 you've indicated you want me to add something in this point in
3 the charge to describe the government's theory, and I'm happy
4 to consider that. I just need you to tell me what it is you
5 want me to add.

6 MR. NAFTALIS: I think it could be a new sentence.
7 "Furthermore, the government alleges that Mr. Tuzman falsely
8 represented to KITDigital."

9 THE COURT: All right. Just give me a second.

10 "That Mr. Tuzman falsely" what? "Falsely
11 represented," did you say?

12 MR. NAFTALIS: Yes.

13 THE COURT: "Represented to KITDigital." OK.

14 MR. WILLIAMS: If I can continue to read, your Honor,
15 "that Mr. Tuzman falsely represented to KITDigital that a
16 \$250,000 investment was a legitimate investment with Maiden
17 Capital."

18 THE COURT: A \$250,000 investment -- whose investment?

19 MR. WILLIAMS: "A \$250,000 KITDigital investment with
20 Maiden Capital was, in fact, a legitimate investment with
21 Maiden Capital, when, as Tuzman and Maiden had agreed --"

22 THE COURT: Wait a second. All right. "Had agreed."

23 MR. WILLIAMS: "-- it was instead to be paid to Tuzman
24 for his personal use."

25 THE COURT: All right. The whole sentence would read,

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1 "The government also alleges that Mr. Tuzman falsely
2 represented to KITDigital that a \$250,000 KITDigital investment
3 with Maiden Capital was a legitimate investment, whereas
4 Mr. Tuzman and Maiden had agreed it was instead to be paid to
5 Mr. Tuzman for his personal use".

6 MR. WILLIAMS: The language is not beautiful, your
7 Honor, but it comes from the indictment, so that's why we're
8 suggesting it.

9 MR. WEITZMAN: Your Honor, I understand it comes from
10 the indictment. We object. I think it's fairly encompassed
11 within the "improper purpose" prong. I think it just makes it
12 more cumbersome and details the government's theory in a
13 one-sided way, but I understand that it does come from the
14 indictment.

15 I think it's redundant of the point, that they have a
16 preexisting relationship and that investments are being made,
17 according to the government, for improper purpose. I don't
18 think it needs that. I think this is just a subset of that
19 theory.

20 THE COURT: Listen, I was concerned that this count
21 was opaque. That's why I added the language. It was totally
22 opaque. I think it's still somewhat opaque without the
23 addition that the government suggests, so my inclination is to
24 add the language the government has suggested, which is lifted
25 from the indictment, paragraph 79.

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1 Anything anyone else wants to say about page 24?

2 MR. JACKSON: Your Honor, with apologies, can we
3 return to page 22?

4 THE COURT: Yes.

5 MR. JACKSON: Just continuing to reflect on this issue
6 we're discussing, I do believe there's a similar opacity
7 problem with the Count Three instruction. I don't think it
8 requires much modification, but I do think it would be improper
9 for the jury to not have some guidance from the indictment in
10 terms of what is charged in terms of this aiding and abetting.
11 We would request that within the paragraph that says "from in
12 or about March 2009 through in or about June 2012," I think
13 that before that, there is specific language in the indictment
14 that identifies what Omar and Irfan Amanat are alleged to have
15 done in aiding and abetting this investment-adviser fraud in
16 paragraph 53 of the indictment.

17 Specifically it says, "By providing Maiden with
18 capital contributions to meet redemption requests knowing that
19 Maiden Capital investors had been lied to by Maiden about the
20 Enable losses and the status of their investments and providing
21 false account statements regarding Maiden Capital investment in
22 Enable, Omar Amanat and Irfan Amanat assisted Maiden in
23 carrying out his fraudulent scheme and helped Maiden succeed in
24 covering up the losses for over three years."

25 MR. NAFTALIS: Mr. Jackson, where did you want to

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1 insert that, just so we can sort of follow it?

2 MR. JACKSON: I mean, it's a little bit -- I think
3 that it should say, "The indictment charges that," and then
4 include whatever portion of that language the Court thinks is
5 appropriate to give some specificity, and then I think it
6 should include the language that it has here and say something
7 connecting them, like "and by such means," or something like
8 that, "from in or about March 2009 through in or about June
9 2012."

10 THE COURT: I'd be inclined to put it after.

11 MR. JACKSON: After works for me as well, Judge. It's
12 before the indictment; whatever works, though. I think that
13 both after and before would be appropriate.

14 THE COURT: Essentially, you want me to include the
15 language that begins "by providing Maiden."

16 MR. JACKSON: Right. I would say, "Specifically, the
17 indictment alleges that by providing Maiden with capital
18 contributions."

19 MR. NAFTALIS: Your Honor, I think if we're going to
20 include this, I think it really should include the majority of
21 paragraph 53, so "rather than disclose the Enable losses,"
22 which begins on the bottom of page 20, through the end of that
23 paragraph.

24 MR. JACKSON: I don't have any objection to that.

25 THE COURT: All right. Just to be clear, at the

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1 bottom of the paragraph on page 22, I will add the following:

2 "The indictment further alleges that," and it will
3 pick up with a quote, "rather than disclose the Enable losses
4 to investors in the Maiden fund, as he was legally obligated to
5 do," etc., and then I will take it all the way through that
6 paragraph to the end; it's paragraph 53 of the indictment.

7 My inclination is to take out Irfan's name.

8 MR. NAFTALIS: That's fine, your Honor.

9 THE COURT: Because Irfan's not on trial and it's not
10 a conspiracy count, so I don't see any point in mentioning
11 Irfan.

12 MR. JACKSON: I agree, your Honor.

13 MR. WEITZMAN: And I noted the same thing in several
14 other pages. For instance, Irfan's name appears in Count Six.

15 THE COURT: Where it's a conspiracy, it belongs there.
16 Where it's not a conspiracy, it doesn't. If it's a conspiracy,
17 I have to include it. In other words, if the indictment
18 charges that Irfan's a coconspirator --

19 MR. WEITZMAN: But lots of people are charged as
20 coconspirators. I think it's confusing.

21 THE COURT: I disagree with you. That's not true.
22 Lots of people are not charged in this indictment with being
23 coconspirators. Very few people are named as coconspirators.
24 Where they are, I'm going to be using the name. If you have an
25 objection to that, you're welcome to raise it as we walk

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1 through this, but it doesn't belong in this count because it's
2 not a conspiracy count.

3 The jury's entitled to know who the government claims
4 is a coconspirator. To the extent the indictment names
5 somebody as a coconspirator, I intend to tell the jury that.
6 If you have a problem with that, you'll let me know.

7 OK. That's what I'm going to do. I'll pick up with
8 "rather than," and I will quote the rest of the paragraph,
9 omitting Irfan Amanat's name.

10 MR. JACKSON: Thank you, your Honor.

11 MR. NAFTALIS: Your Honor, when you're ready, we have
12 an edit on 25.

13 THE COURT: OK. Page 25.

14 MR. NAFTALIS: In the paragraph beginning "Finally,"
15 right under F.

16 THE COURT: "Finally, in Count Six"?

17 MR. NAFTALIS: Correct.

18 THE COURT: OK.

19 MR. NAFTALIS: It reads right now as if it's a
20 dual-object conspiracy. Actually, there are three objects, so
21 conspiracy to commit securities fraud is one, conspiracy to
22 make false statements in KITDigital's annual and quarterly
23 reports filed with the SEC is two, and then the third one is
24 making false statements to KITDigital's auditors. We would
25 suggest inserting perhaps a little (i) or little (a) before "to

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1 commit securities fraud," then comma, little (ii) "to make
2 false statements," etc., and then little (iii) to make false
3 statements to KITDigital's auditors, just to make clear it's
4 three different objects.

5 THE COURT: OK. All right. I will do that.

6 MR. WEITZMAN: Your Honor, as you invited me, I'd like
7 to explain why I think we should be deleting, in the second
8 paragraph under Count Six, "and Irfan Amanat."

9 THE COURT: OK.

10 (Continued on next page)

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1 MR. WEITZMAN: And the reason is because there's a
2 failure of proof on this issue, and it goes specifically from
3 my review of the court record, it goes to the overt act
4 section, for example, the government abandoned and didn't prove
5 several of the overt acts, and I think it would be improper to
6 charge the jury --

7 THE COURT: Before we get to the overt acts, could we
8 stick with the page that we're on? You talk about the overt
9 acts when we get there but let's talk about -- you want to
10 eliminate the reference to Irfan Amanat on page 25 even though
11 that's what the time charges.

12 MR. WEITZMAN: Yes, your Honor, and that's because --
13 and I know you want to stay at page 24, but the basis for
14 including him as a co-conspirator was the allegation that he
15 sent Enable confirmations to KIT Digital's auditors. My review
16 of the record does not have any of those confirmations in
17 evidence. And the government did not bring that out, to my
18 recollection, before the jury. And so it's coming out of
19 nowhere with no evidentiary support and is confusing because
20 all they heard is Irfan has been involved in this Maiden
21 Capital fraud.

22 THE COURT: So what does the government say?

23 MR. WILLIAMS: We have to go back and look at the
24 record, but I think that we agree that we may not have put in
25 the false audit confirmation reference in the charge. He is

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1 certainly on emails, and the jury has seen evidence of Irfan
2 Amanat, Omar Amanat, and others discussing a balance
3 confirmation into the auditors. So it's not as if the jury
4 hasn't heard of Irfan being involved in balance confirmations
5 to auditors. So we rather the overt act coming out, if that's
6 the best solution, but we haven't walked away from the
7 allegation that Irfan was involved in the accounting fraud.

8 MR. WEITZMAN: So your Honor, I recognize it's part of
9 the indictment and it's a separate trial. I don't think the
10 government loses anything. I don't think the jury lacks any
11 clarity by saying Kaleil Isaza Tuzman and others known and
12 unknown. It's very clear the government is alleging many
13 co-conspirators, Rima Jameel, Petr Stransky, Nigel Regan, Tomas
14 Petru, Robin Smyth, Gavin Champion. There's not going to be an
15 argument on Count Six that it's a conspiracy of one and there's
16 no conviction. I just think it confuses the matter to include
17 Irfan when there's a different defendant by the same last name,
18 Omar.

19 MR. NAFTALIS: Everyone knows they're different people
20 at this point, but I don't think we can take something out of
21 the indictment when there is proof. We believe the overt act
22 could come out. We don't want to tee that up for no reason,
23 but there's certainly evidence that Irfan Amanat is involved in
24 this part of the conspiracy, so we don't see a basis to take it
25 out, but we agree it is fair to take out the overt act.

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1 MR. WEITZMAN: There are two overt acts that reference
2 Irfan Amanat sending balance confirmations.

3 THE COURT: I will leave the reference to Irfan Amanat
4 on page 25.

5 There's also a reference to Irfan Amanat on page 26.

6 MR. WEITZMAN: Correct.

7 THE COURT: And Mr. Weitzman, you would make the same
8 argument about that.

9 MR. WEITZMAN: I would.

10 THE COURT: And I'm rejecting that argument.

11 But with respect to the overt acts, I do agree if
12 there's no evidence in support of the overt -- a certain overt
13 act, I agree it would be appropriate to take it out, but which
14 ones do you have in mind?

15 MR. WEITZMAN: So with respect to Irfan Amanat, overt
16 act number one on page 27, and overt act number five on page
17 27, neither of them have been submitted into evidence.

18 Furthermore --

19 THE COURT: The government agrees?

20 MR. NAFTALIS: Yes.

21 THE COURT: So one and five are gone.

22 Go ahead, Mr. Weitzman.

23 MR. WEITZMAN: I don't believe overt act number two
24 was proven or even alleged, which is a Burns call conference
25 that my client and Robin Smyth participated in. This is

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1 testimony about an earnings call conference in 2011, but
2 there's no testimony or evidence about this one, to my
3 recollection.

4 MR. NAFTALIS: We're fine with that coming out.

5 THE COURT: So paragraph little Roman Numeral 2 will
6 come out?

7 MR. NAFTALIS: Yes.

8 THE COURT: Overt acts that are problematic?

9 MR. WEITZMAN: Sorry, I missed one more, overt act
10 number nine, which another false balance confirmation by Irfan
11 Amanat.

12 MR. NAFTALIS: That's fine.

13 THE COURT: Number nine will come out.

14 Okay.

15 MR. WEITZMAN: Those are the only ones I identified,
16 your Honor.

17 THE COURT: All right. That brings us to page 29.
18 Changes on page 29?

19 What's the next page?

20 MR. WEITZMAN: Your Honor, I've been working through
21 this wire fraud instruction, and I think that several of my
22 comments to the wire fraud constructions are specific to my
23 client and may or may not apply to Omar Amanat. The essence of
24 the -- I'm trying to match up pages, your Honor.

25 So in the first instance, I know this is a typical

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1 instruction on page 30, when people undertake to enter into a
2 criminal conspiracy much is often left to the unexpressed
3 understanding. We would just add this sentence to the effect
4 at the end of the paragraph that says there must be some
5 evidence from which you could conclude that alleged
6 conspirators have manifested their assent.

7 THE COURT: Well, that's what the next sentence says,
8 it is enough if two or more people, in some way or manner,
9 impliedly or tacitly come to an understanding to violate the
10 law.

11 MR. WEITZMAN: I see, yes.

12 THE COURT: What I could do is say if there is
13 evidence that two or more people, blah, blah, blah, is that
14 what you want?

15 MR. WEITZMAN: Sufficient evidence, yes, your Honor.

16 MR. NAFTALIS: I don't know what sufficient means
17 there. We're fine -- it is enough if there was evidence, but
18 sufficient evidence starts to invite --

19 THE COURT: It is enough if the evidence demonstrates
20 that?

21 MR. WEITZMAN: Yes, your Honor, that's fine with us.

22 MR. NAFTALIS: That's fine.

23 THE COURT: Okay. What's next?

24 MR. NAFTALIS: We don't have anything until 43. I
25 don't know if anyone has anything else before that.

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1 MR. WEITZMAN: In sub A, elements, and then the first
2 element of wire fraud, page 33, 34, I actually don't know where
3 it goes, I'm still trying to figure that out, but there are a
4 couple of edits I'm requesting. So on page 34 in the paragraph
5 that starts with in order to satisfy this first element.

6 THE COURT: Yes.

7 MR. WEITZMAN: The government must also prove the
8 alleged scheme of depriving another of money or property, and
9 that the -- we would propose the following, and I will identify
10 a citation, and that the participants contemplated some actual
11 harm or injury to the intended victims, and it comes from
12 *United States v. Binday*, 804 F.3d 558, jump site 569 (2d Cir.
13 2015).

14 THE COURT: I think the government submitted a letter
15 on this, didn't you, Mr. Williams?

16 MR. NAFTALIS: Yes, we did, your Honor. So we think
17 the instructions -- this is like the standard instruction, and
18 we don't understand what the insertion is supposed to do.

19 THE COURT: What was the date of that letter? I read
20 it.

21 MR. NAFTALIS: We sent it last night. I could hand
22 you up a copy, your Honor.

23 THE COURT: Yes, that would be helpful. I have a lot
24 of paper up here.

25 MR. NAFTALIS: I thought their citation for the harm

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1 issue was an Eleventh Circuit case which the Second Circuit
2 doesn't write -- doesn't support adding additional instruction.

3 THE COURT: So Mr. Weitzman, is it your position that
4 if I look in *United States v. Bindow* I am going to conclude
5 that the language that I have in here is incorrect, is that
6 your position?

7 MR. WEITZMAN: It is my position that *Bindow* supports
8 the requested charge, and I'm turning to it right now.

9 If I could explain to your Honor why I think it's
10 important, what I believe the flaw of the Count Five is, is
11 that under *Bindow* and other cases the material omission has to
12 concern an essential element of the bargained for exchange.
13 Not every omission of fact concerns the bargained for exchange
14 where you're subjecting the individual or entity to an
15 unintended to risk of loss.

16 We believe and we submit, your Honor, that there's no
17 evidence sufficient in the record to support that Kaleil knew
18 that Mr. Maiden was running a Ponzi scheme. We think we
19 debunked that. So all he's done is he subjected KIT Digital to
20 the same risk of loss that he knew of or that KIT Digital knew
21 of, which is an investment in a hedge fund that was deceiving
22 its investors in claiming good returns.

23 That is not sufficient, in our opinion, to sustain a
24 wire fraud charge. We believe that you have to lie about, for
25 example, whether Maiden Capital was a legitimate hedge fund or

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1 not. If we are right, and I believe we are, that Kaleil, my
2 client, was deceived about Maiden Capital, the fact that he
3 didn't disclose that he was also an investor but withdrawing
4 money from Maiden Capital does not constitute a wire fraud
5 because he never intended to subject KIT Digital to an
6 undisclosed risk of loss. They're subjected to a disclosed
7 risk of loss, which is that they are investing in a hedge fund.

8 So I think it's imperative that there be an
9 instruction consistent with *Binday* where the jury is instructed
10 that it has to be -- there has to be a contemplated actual harm
11 or injury. That's the intent to defraud.

12 THE COURT: I need a copy of this case. Do you have a
13 copy of the case?

14 MR. WEITZMAN: I have my copy of the case that I would
15 be happy to hand up to your Honor.

16 MR. NAFTALIS: My understanding of the issue they were
17 raising in this 11th Circuit case, I can't remember the facts,
18 but whoever the victim was was going to invest anyway, so they
19 weren't being tricked into doing anything.

20 MR. JACKSON: Talking about *Binday*? *Binday* is Second
21 Circuit.

22 MR. NAFTALIS: This is sort of taking me by surprise,
23 I thought the argument was based on an Eleventh Circuit case.
24 They cited *Binday*, which is sort of the leading wire fraud case
25 in the circuit, as I recall on this issue, but the issue is you

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1 would have invested anyway, so therefore you weren't defrauded.
2 I think that's basically what he is arguing. I don't know how
3 this instruction is wrong if that's their theory, but I don't
4 think the instruction is wrong. It's an intent argument, it
5 doesn't change the harm argument, he didn't intend to harm in
6 anyone because didn't know -- that doesn't mean the instruction
7 is somehow lacking is.

8 MR. WEITZMAN: Your Honor, my version has my
9 handwritten notes, I apologize. I'm happy to pass it up to
10 you.

11 THE COURT: No, I will have my law clerks print it
12 out. If I had known that everything was going to go on cases,
13 I would have brought it down with me.

14 MR. WEITZMAN: 804 F.3d 558.

15 MR. NAFTALIS: Your Honor, I think the paragraph
16 begins in this regard, that is the language, as I understand
17 it, that is the result of *Binday* and that line of cases. So in
18 order to satisfy this element is sort of --

19 THE COURT: That's what I thought you wanted,
20 Mr. Weitzman, and I included it, the whole concept of people
21 being able to make informed decisions about what to do with
22 their money. I thought that's what you were interested in,
23 and --

24 MR. WEITZMAN: It certainly takes us part of the way,
25 but *Binday* make it very clear that not every deceit about a

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1 transaction, even material information, can constitute a wire
2 fraud. And if you -- I would draw your Honor's attention to
3 key cite four, and in particular also key cite five and
4 footnote ten, for example, they cite to the *Mittelstaedt*
5 opinion, which is another Second Circuit opinion, and I'm happy
6 to quote it, what they say in *United States v. Mittelstaedt*,
7 where a government --

8 THE COURT: Sir, I'm going to print it out, don't
9 bother reading it.

10 MR. WEITZMAN: Fair enough.

11 MR. NAFTALIS: Your Honor, hearing this now, when you
12 read the three paragraphs on this page, that's sort of what a
13 material piece of information is, that has to be material to
14 the decision.

15 MR. WEITZMAN: But --

16 THE COURT: Wait until I read the case.

17 (Pause)

18 THE COURT: So I have the opinion, Mr. Weitzman, or
19 most of it anyway. What do you want me to -- what pages should
20 I be looking at?

21 MR. WEITZMAN: Page 570 of the opinion, jump cite.

22 THE COURT: All right. Give me a minute.

23 MR. WEITZMAN: Yes, your Honor.

24 (Pause)

25 THE COURT: Well, I read page 570. Is 571 important,

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1 too?

2 MR. WEITZMAN: Yes, your Honor, I think footnote 10.
3 I don't know if that's 570 or 571.

4 THE COURT: I can't find footnote 10.

5 MR. WEITZMAN: It may be a printing issue. It's the
6 paragraph for me that begins: For example, in *United States v.*
7 *Starr* --

8 THE COURT: I'm asking you where it is in the text.

9 MR. WEITZMAN: On my version --

10 THE COURT: I want to know where it is in the text.

11 MR. WEITZMAN: On my version I believe it's on page
12 571, your Honor.

13 THE COURT: Okay. That can't be right because it's --
14 okay, it's on 570.

15 So the text sentence reads, "We have repeatedly
16 rejected application of the mail and wire fraud statutes where
17 the purported victim received the full economic benefit of its
18 bargain." And then footnote 10 comes in. So far I don't see
19 anything that's relevant, so tell me what you want me to look
20 at in paragraph 10.

21 MR. WEITZMAN: So the description in, for example --

22 THE COURT: I should have said footnote 10.

23 MR. WEITZMAN: There are two cases, for example, *Novak*
24 and *Mittelstaedt*. We'll start with *Novak*. It says in *Novak* we
25 held where a defendant's counter parties had received all they

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1 bargained for, it was not sufficient to support conviction for
2 mail fraud that the counter parties might have refused the
3 bargain had they been aware that defendant would receive a
4 portion of the money as a personal kickback.

5 It then continues, in *United States v. Mittelstaedt*
6 where a government employee concealed his ownership interest in
7 property that his department agreed to purchase, we held that
8 it was not sufficient to show that the government, had it known
9 the truth, would have refused to deal with him on general
10 principles; rather, to convict, the government has to establish
11 that the omission caused or was intended to cause actual harm
12 to purchaser of a pecuniary nature or that the purchaser could
13 have negotiated a better deal for itself had it not been
14 deceived.

15 So it distinguishes -- this case law I think
16 distinguishes an intent to defraud, meaning intent to deceive.
17 Not every deception is an intent to defraud, it has to be
18 intended to subject the recipient of the fraud to some actual
19 harm or injury that was undisclosed. Our position is that they
20 knew they were investing in a hedge fund no different than
21 Kaleil believed that he was investing in a legitimate hedge
22 fund that was deceiving everybody. So there's no undisclosed
23 risk. And so just --

24 THE COURT: Tell me again what language you want to
25 add.

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1 MR. WEITZMAN: In the first paragraph -- in the
2 paragraph on page --

3 THE COURT: I know the paragraph, page 34, in order to
4 satisfy the first element.

5 MR. WEITZMAN: Yes.

6 THE COURT: Go ahead.

7 MR. WEITZMAN: The government must also prove that the
8 alleged scheme contemplated depriving another of money or
9 property and contemplated subjecting the intended --

10 THE COURT: Now I need you to read more slowly. And
11 contemplated what?

12 MR. WEITZMAN: Subjecting the intended or alleged,
13 whichever, victim, to some actual harm or injury, actual
14 pecuniary harm or injury.

15 THE COURT: I got to tell you, I don't see what that
16 adds. I really don't understand what it adds.

17 MR. WEITZMAN: It's an important part of the scienter
18 issue for us, which is Kaleil didn't intend to have KIT Digital
19 subjected to any risks of loss other than the inherent risk of
20 loss of an investment.

21 THE COURT: But this says that the government must
22 also prove that the alleged scheme contemplated depriving
23 another of money or property. So that means -- to translate,
24 that means that the government would have to prove that
25 Mr. Tuzman specifically entered into the alleged scheme

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1 contemplating that -- we haven't gotten to that charge yet, but
2 contemplating that KIT Digital would be deprived of money and
3 property.

4 MR. WEITZMAN: But they will argue that the mere
5 transfer of the money to a hedge fund is a deprivation of KIT
6 Digital's money, and I think that that's incorrect under the
7 law.

8 THE COURT: Are you going to argue that?

9 MR. WILLIAMS: No, I think we would argue consistent
10 with the language that comes later on the page that --

11 THE COURT: That they were deprived of information,
12 that's your theory.

13 MR. WILLIAMS: Right, prevent them from making an
14 informed decision about what to do with their money.

15 THE COURT: I think you're setting up a straw man that
16 is not their argument. Their argument is based on that KIT
17 Digital was deprived of the necessary information to make a
18 rational decision about what to do. That's their theory.

19 MR. WEITZMAN: And on that issue I have another
20 proposed instruction. But I do think -- I believe, your Honor,
21 that under the law if Kaleil did not know that Maiden Capital
22 was a fraud, he cannot be guilty of wire fraud. Because
23 everything that -- whatever KIT Digital knew is what Kaleil
24 knew about the risk of the investment, and so he's not
25 subjecting them to an undisclosed risk of loss. That would be

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1 the intend to defraud. And I think that the instruction that
2 I'm proposing in that sentence captures what the law requires.

3 MR. NAFTALIS: Your Honor, I think this is an argument
4 that's not our theory. Our theory was that everyone knew --
5 they're sending emails about how they're going down the sewer.
6 He didn't put in money and find out a year later he made a bad
7 investment.

8 THE COURT: I'm not going to add the language on page
9 34 that Mr. Weitzman has asked for. I don't believe the charge
10 is -- that the language I used on page 34 is inaccurate in any
11 way, and I don't think that the language that Mr. Weitzman just
12 read to me adds anything. So that is my ruling.

13 MR. WEITZMAN: I appreciate that, your Honor.

14 THE COURT: At least on page 34 I'm not adding the
15 language you want.

16 MR. WEITZMAN: There's another aspect of the *Binday*
17 ruling which I think results an appropriate addition in the
18 next paragraph, second sentence: Rather a person is also
19 deprived of money or property when that person is provided
20 false or fraudulent information that it believed would prevent
21 him from being able to make informed decisions.

22 I think the language in *Binday* actually says the
23 opposite, which is that not every piece of false information,
24 including false information that is the but for for the
25 investment can constitute a wire fraud. And the language that

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1 they use in *Binday* is that the false information has to be
2 quote, unquote, regarding an essential element of the bargain.

3 THE COURT: I got to tell you that having looked at
4 the case, and particularly the footnote and having read the
5 text that to which the footnote is added, what they seem to be
6 concerned about in *Binday*, page 570, is whether the purported
7 victim received the full economic benefit of its bargain.
8 That's what they're concerned about, at least on that page,
9 that's what I believe they're talking about in footnote 10. I
10 don't see that issue being implicated here.

11 And just to finish the thought, the point the court is
12 trying to make is that where the alleged victim received the
13 full economic benefit of its bargain, a fraud has not been
14 committed, at least not one that he could be prosecuted for.

15 MR. WEITZMAN: I understand that, your Honor. I think
16 that the emphasis in *Binday* is that it has to be essential to
17 the transaction, essential to the bargained for exchange is
18 exactly --

19 THE COURT: So what language do you want me to --

20 MR. WEITZMAN: Where I see it is in paragraph 4 --
21 sorry, key cite four, I don't know if you have Lexus or
22 Westlaw, but the paragraph that says it's not sufficient.

23 THE COURT: Let me read that paragraph.

24 (Pause)

25 THE COURT: You're right, the court does say that not

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1 every transaction produced by deceit is actionable, you're
2 right, but then the court goes on to say rather, the deceit
3 must deprive the victim of potentially valuable economic
4 information. That's exactly what I charged, that's the
5 language that I'm using in the next paragraph.

6 In fact, it's almost in haec verba. I say, "Rather, a
7 person is also deprived of money and property when that person
8 was provided false or fraudulent information that it believed
9 would prevent him from being able to make informed decisions
10 about what to do with his money and property." That's the same
11 concept. I mean I haven't used the words "potentially valuable
12 economic information" because I didn't think it fit here, but
13 that is what I am communicating in that paragraph.

14 MR. WEITZMAN: Here's the issue, I think that the
15 important language is the language towards the end of the
16 paragraph that I pointed your Honor to, where it says that the
17 information misrepresentation has to concern an essential
18 element of the bargain.

19 And here is the point, your Honor, Kaleil didn't
20 deceive KIT Digital in our opinion about what Maiden Capital
21 was. Kaleil was deceived about what Maiden Capital was. So
22 deception about, for example, whether Kaleil was an investor in
23 Maiden Capital or was pulling out his money in Maiden Capital
24 doesn't go to the essence of the bargain that KIT Digital made,
25 which was an investment in Maiden Capital that they were

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1 cheated out of.

2 So even if KIT Digital would not have made the
3 investment, because it's not a but for test, it has to concern
4 the essential element of the bargain. And the bargain here was
5 KIT Digital was going to invest in Maiden Capital and Maiden
6 Capital was going to invest KIT Digital's money. In reality,
7 neither Kaleil nor KIT Digital knew that Maiden Capital was
8 going to take KIT Digital's money and start paying off
9 redemptions to others. Maiden Capital acknowledged that.
10 Maiden I think acknowledged that on the witness stand. So the
11 essence of the bargain is an important component because there
12 was no misrepresentation about that.

13 THE COURT: What do you say?

14 MR. WILLIAMS: We have a different view of that.
15 There was substantial testimony, specifically on the \$250,000
16 investment that they had a phone where Maiden told him I don't
17 have money, and then Kaleil went back to KIT Digital and said
18 hey, kick in 250, and then Maiden kicked out 288.

19 THE COURT: Yes, it just -- I remember that testimony,
20 too. They just have a different theory here. There's evidence
21 that supports it. I understand your argument, but they have
22 evidence from which they can make the arguments they want to
23 make.

24 MR. WEITZMAN: I agree with that, your Honor. I'm not
25 trying to deprive them of the argument they want to make, which

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1 is if they make that argument, at least that concerns the
2 essence of the bargain. But I think that there needs to be an
3 instruction that differentiates between misrepresentations that
4 don't go to the essence of the bargain and misrepresentations
5 that do. I view that evidence and testimony very differently
6 than the government. I think what Mr. Maiden was saying is I'm
7 not liquid, not I'm bankrupt.

8 THE COURT: So far you haven't -- while you have
9 quoted to me this essence of the bargain repeatedly, you
10 haven't suggested -- the language you have suggested didn't
11 include that at all. I am willing to consider language, but
12 you have to suggest it to me.

13 MR. WEITZMAN: The language I'm suggesting is in that
14 sentence that starts with "rather," rather a person is also
15 deprived of money or property when that person is provided
16 false or fraudulent information regarding an essential element
17 of the bargained for exchange, or something to that effect. It
18 has to say essential element of the transaction.

19 MR. NAFTALIS: We don't think that is accurate, and we
20 think that the definition on the top as to what is material --
21 the issue in *Binday* and the Eleventh Circuit case, as your
22 Honor pointed out, is when someone is going to do the deal
23 anyway, they're not being defrauded.

24 THE COURT: I ruled. I'm not going to include this
25 language. Let's move on.

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1 MR. JACKSON: Your Honor, I have some small
2 suggestions on page 35.

3 THE COURT: Okay.

4 MR. JACKSON: If the Court is inclined, in the third
5 paragraph that starts with "in order," we would request that
6 the language where it says it is sufficient, that sentence be
7 changed to it is sufficient if you find that a scheme to
8 defraud has been proven, as opposed to existed.

9 THE COURT: Do you have a problem with that?

10 MR. NAFTALIS: I'm trying to figure out if it makes
11 sense in English, but in concept, I don't think I do.

12 THE COURT: Yes, I have no problem with that.

13 MR. JACKSON: Thank you, Judge.

14 Also on this page, just in the subsequent paragraph,
15 this is just one of these semantic things I'm a little
16 concerned there could be confusion in this first sentence
17 because it says also not required that the defendant
18 participate in or have knowledge of all the operations of the
19 fraud scheme.

20 So I absolutely understand what the Court is
21 indicating is that all of the operations of the fraud scheme
22 applies to participate in and have knowledge of, but I'm
23 concerned that someone could read that and think that there's
24 no requirement that the defendant participate. It's not
25 required that the government prove that the defendant

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1 participated in the fraud scheme, so I think that there's
2 actually -- I think that sentence can be left alone, and if we
3 just add a third sentence to that paragraph, and I think it
4 would also give just a little more balance to the page because
5 it talks a lot about things that are not necessary, and the
6 sentence that we respectfully request, your Honor, is the
7 government must, however, prove beyond a reasonable doubt that
8 the defendant did in fact participate and have the required
9 knowledge in the alleged fraud scheme.

10 MR. NAFTALIS: Your Honor, that seems clunky to us.
11 The first sentence of this element is that the advised or
12 participated in the fraudulent scheme. That's what we have to
13 prove. And this is just explaining that that means.

14 There's a section -- a sentence the next paragraph
15 that defines what it means to participate. The whole point is
16 your Honor is instructing what it means to participate, and
17 then you're sort of explaining that what -- you don't have to
18 know about everything to participate. So I don't think it's
19 necessary to sort of -- I think it confuses what your Honor
20 said in the prior paragraphs.

21 THE COURT: I just don't really see what it adds. If
22 you look at the sentence above that, Mr. Jackson, the one that
23 begins it is sufficient if you find that a scheme to defraud
24 has been proven. That's the language you wanted, even if
25 originated by another, and that the defendant, while aware of

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1 the scheme's existence, knowingly participated in it.

2 MR. JACKSON: Your Honor, you raise a good point.
3 Could we cure the potential ambiguity I'm talking about by just
4 saying it is also not required that the defendant participated
5 in all of the operation of the fraud scheme or had knowledge of
6 all the operations of the fraud scheme?

7 MR. NAFTALIS: That's fine, your Honor.

8 THE COURT: That's fine.

9 MR. JACKSON: And my last suggestion on this page,
10 your Honor, in the final full paragraph, it says in the
11 sentence that begins with "even if a defendant," we would
12 request --

13 THE COURT: Is this on the same page?

14 MR. JACKSON: Yes, your Honor, it says even if a
15 defendant participated in the scheme in a lesser degree than
16 others, he is nevertheless equally guilty so long as -- we ask
17 and that it say the government has proven that the defendant
18 became a member of the scheme to defraud with knowledge of its
19 general scope and purpose.

20 THE COURT: Yeah, I don't have a problem. So it reads
21 so long as the government has proven that that defendant became
22 a member of the scheme or fraud with knowledge of its general
23 scope and scope.

24 MR. JACKSON: Yes, Judge.

25 THE COURT: I will add that.

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1 We're at the bottom of page 35, what's next?

2 MR. NAFTALIS: 43.

3 THE COURT: 43 is in the substantive wire fraud count.

4 MR. NAFTALIS: Your Honor, just above that, the edit
5 is -- it's the same issue.

6 THE COURT: False account statements?

7 MR. NAFTALIS: Yeah. It could be knowing the
8 information in the false account statements was intended to be
9 presented to, and then it gets both theories that Mr. Jackson
10 likes and that we like, which is the information that was
11 presented directly -- right now it says on the last sentence
12 and by providing Maiden with false accounts statements
13 regarding Maiden Capital's investment in Enable, knowing that
14 such a false -- that such false account statements were
15 intended to be presented and were represented to Maiden Capital
16 investors knowing that the information contained in the false
17 account statements.

18 MR. JACKSON: That's not what is charged in the
19 indictment.

20 THE COURT: Yeah, I think the best I could do on this
21 is to go back to how we resolved this issue in the first place.

22 MR. NAFTALIS: That's fine, your Honor.

23 THE COURT: I will have to go back to what we did. We
24 were talking about the indictment.

25 MR. JACKSON: I'm fine with that, Judge. I don't

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1 think that we need it twice, but I'm fine with that.

2 THE COURT: Well, the reason I would need it twice is
3 we're now on page 43, so --

4 MR. JACKSON: It makes perfect sense.

5 THE COURT: A lot of water over the dam.

6 MR. JACKSON: Yeah.

7 THE COURT: So I will leave the language that's there,
8 Mr. Naftalis, I will add the language from paragraph 35 of the
9 indictment.

10 MR. NAFTALIS: That's fine, your Honor, thank you.

11 You also need to capitalize "capital."

12 THE COURT: I did that, thank you.

13 Still on page 43.

14 MR. JACKSON: I don't have anything else on 43, your
15 Honor.

16 MR. NAFTALIS: I don't have anything until 48, your
17 Honor.

18 MR. JACKSON: On 44 -- no, that's all fine, your
19 Honor, I'm sorry.

20 THE COURT: 45, anything on 45?

21 46, 47?

22 MR. JACKSON: Yes, your Honor.

23 THE COURT: All right.

24 MR. JACKSON: I'm not inclined to rehash all of my
25 arguments in my September 20 letter, your Honor, but I do think

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1 that the elements as suggested by the government, which I think
2 are what we have here, I don't think that they're really
3 sufficient under the statute for aiding and abetting investment
4 adviser fraud. I'm happy to discuss it further with the Court
5 if the Court would like, but I don't have anything new to add
6 from what I submitted in my two letters on the issue.

7 THE COURT: Which letter was that, Mr. Jackson?

8 MR. JACKSON: Judge, the first letter that I raised
9 this in was a September 20, 2017 letter. I'm pulling it out.
10 Sorry, September 19, 2017, it appears I wrote it, maybe I filed
11 it late at night, but docket number 448 on the docket.

12 THE COURT: Maybe we could print it out.

13 (Pause)

14 THE COURT: So I have your September 19 letter,
15 Mr. Jackson.

16 MR. JACKSON: Yes, your Honor. One of our subsequent
17 letters we elaborate on this and sent a bunch of letters, but
18 the point is the same. Aiding and abetting investment adviser
19 fraud I think the government has conceded doesn't appear to be
20 anything anyone has ever been convicted of at trial. There are
21 no precedent jury instructions for this. The instructions that
22 were suggested by the government here come from a series of
23 cases where the principals who were actual investment advisers
24 were charged.

25 Now frankly, I don't think that aiding and abetting

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1 investment adviser fraud is actually a crime, and we -- I don't
2 think it's a crime that's proveable. And I think in our Rule
3 29 motion we argued that the government has not established in
4 order to prove this, but I think if it is proveable, and we can
5 assume it is for the purposes of discussing the appropriate
6 instructions, it can't -- where the Supreme Court and the other
7 courts have looked at this have put so much emphasis on the
8 fact that the Investment Advisers Act of 1940 reflects a
9 congressional recognition of the delicate fiduciary nature of
10 an investment adviser relationship. And that's a quote from
11 *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, which we
12 cite on the second page of our letter, the whole basis of this
13 crime comes down to the idea, just to get very blunt about it,
14 that an investment adviser has this very special relationship
15 with these investors where he will understand everything that
16 has been communicated to them and hasn't been communicated to
17 them. And so a person who is not actually the investment
18 adviser by definition is going to be -- it's going to be almost
19 impossible for them to stand in the shoes of the investment
20 adviser. And I think the proof in this case really underscored
21 that when Mr. Maiden conceded the wide range of information
22 about what he was doing that Mr. Amanat had no way of knowing,
23 what he was communicating with his investors what he was not
24 communicating with his investors.

25 So the point is I don't think that we can simply add

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1 to the regular elements of investment adviser fraud this fifth
2 element that just says Mr. Amanat willfully and knowingly
3 associated himself in some way with Maiden's commission of
4 investment adviser fraud.

5 THE COURT: Well, I mean if you look at -- and maybe
6 this is just a failure of translation, but if you look at page
7 51, when I talk about the fifth element, you will see that I
8 include the concept that Mr. Amanat not only must have
9 knowingly associated himself with Maiden's crime, not only
10 wilfully and knowingly did something to help make the crime
11 succeed, but also that he did so with a specific intent to
12 deceive Maiden's clients.

13 MR. JACKSON: Yes, your Honor, I saw that, and we
14 appreciate that. We think it is a very good instruction in
15 terms of the fifth element. But your Honor, we respectfully
16 believe that there's still more that is required. I think the
17 jury should be instructed in some way that the government has
18 an obligation to prove that Mr. Amanat had sufficient exposure
19 to Mr. Maiden's -- I phrased it in one of our letters, but I
20 think they have to -- they have to demonstrate that Mr. Amanat
21 was somehow in a position to understand what Mr. Maiden was and
22 was not communicating with regard to his status as an
23 investment adviser to his clients in order to establish that he
24 actually had the requisite mens rea to commit this offense.

25 THE COURT: Isn't there some evidence on this?

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1 MR. WILLIAMS: There is plenty of evidence. Obviously
2 the day after or the same day that Maiden first lied to his
3 investor about the performance of the fund, the first phone
4 call he made was to Omar Amanat to tell him about it, and there
5 is additional evidence going forward after that first date.

6 THE COURT: What is the evidence -- so that would be
7 evidence that Mr. Amanat was informed that Maiden was lying to
8 his investors, but what is the evidence that Mr. Amanat did
9 something that helped Maiden perpetrate this fraud on his
10 clients?

11 MR. WILLIAMS: For instance, causing false Enable
12 account statements to be sent to Maiden. Omar Amanat was on
13 multiple communications where he is -- where Maiden is telling
14 him and Irfan Amanat I need to report my numbers to my
15 investors, where is my Enable statement. Obviously there's the
16 \$700,000 loan that Mr. Amanat gave Maiden forestall investors
17 learning about the Enable disaster. So there's plenty of
18 evidence in the record.

19 As to Mr. Jackson's point about the arguments he
20 wanted to make about lack of exposure, we think that the way
21 the Court has instructed the jury and plans to instruct the
22 jury, he can certainly say that he didn't knowingly associate
23 himself with the crime, that he didn't know there was a crime
24 at all.

25 So there's plenty of mens rea. It's clear that in

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1 order to convict Omar Amanat they would have to find that he
2 had sufficient knowledge and he was acting willfully, so he
3 knew what he was doing was wrong, and that he intended to
4 defraud Maiden's clients. So there's plenty of room for
5 Mr. Jackson to make those arguments.

6 He obviously doesn't have any cases to support the
7 idea that investment advisory fraud is different from other
8 substantive offenses in that aiding and abetting theory can't
9 go hand in hand with it in the same way it would if it were an
10 aiding and abetting wire fraud or something of that nature. So
11 we don't think the fifth element needs to be instructed any
12 differently than the way the Court has done it.

13 MR. JACKSON: Your Honor, I just disagree with the
14 last thing Mr. Williams said, I don't have any cases. I cited
15 Supreme Court analysis of the delicate fiduciary nature of an
16 investment adviser relationship and the fact this whole crime
17 is rooted in that. There are a number of different cases in
18 the Second Circuit that talk about this.

19 THE COURT: I would, rather than deal in the abstract,
20 I am open to considering -- what you are really arguing is this
21 isn't a crime at all, and the Second Circuit ultimately will
22 decide whether it's a crime at all. But you said to me, Judge,
23 I want you to add specific intent to deceive. I looked at your
24 cases, I decided to adopt the reasoning of some of the cases
25 you cited, I added that language. If you have other language

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1 you want me to consider, I'm happy to consider it, but more
2 than that, I can't really do. So the time is now, we're
3 looking at the charge, if there's specific language you want me
4 to consider, tell me, and I will consider it. But beyond that,
5 there's not much I can do.

6 MR. JACKSON: I would ask your Honor in the fifth
7 element instruction that the Court include a sentence that
8 says: In order to establish that Mr. Amanat is guilty of
9 aiding and abetting Maiden's commission of the crime, the
10 government must also establish that Omar Amanat was
11 sufficiently situated, that he had -- that he was able to --
12 that he had knowledge of the full scope of Mr. Maiden's duty
13 and disclosures or lack of disclosures with his investment
14 adviser clients.

15 MR. WILLIAMS: We object to that. We don't think that
16 there is any legal basis for finding an additional element of
17 knowledge.

18 THE COURT: I don't think he has to have universal
19 knowledge of every interaction Mr. Maiden had with his client.
20 He has to know that Mr. Maiden is defrauding his clients, and
21 he has to -- given my instruction, he has to have taken some
22 act to help Maiden defraud his clients, and he has to have
23 taken that act with specific intent to deceive Maiden's
24 clients. That's what I think he has to do. The Second Circuit
25 will ultimately decide whether that is sufficient or not, but

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1 Mr. Jackson, I'm rejecting the language that you just
2 suggested.

3 MR. JACKSON: Thank you, your Honor, we appreciate
4 that.

5 THE COURT: Okay. Anything else on investment
6 adviser -- aiding and abetting investor adviser fraud?

7 MR. NAFTALIS: Yes.

8 MR. WILLIAMS: On page --

9 MR. NAFTALIS: To go back a page to 49, I guess it
10 spills into.

11 THE COURT: Yes.

12 MR. NAFTALIS: So on page 36 of our proposed charge
13 there's the charge -- the gist of it is that you don't have to
14 be a registered investment adviser. We don't know if the
15 defense is going to argue since -- as a hedge fund manager you
16 don't have to be a registered SEC investment adviser, and
17 there's some language in our charge what says to that effect,
18 so we just --

19 THE COURT: I can't remember now if there's proof in
20 the record to whether Maiden was a registered investment
21 adviser or not. I just don't remember.

22 MR. NAFTALIS: He's not.

23 THE COURT: I know he's not, I don't know if there's
24 evidence of that.

25 MR. WEITZMAN: I believe there was some.

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1 MR. NAFTALIS: Someone asked him on cross-examination,
2 I think.

3 MR. WEITZMAN: I think Mr. Melley said he never passed
4 the FINRA exam. I recall that. I think someone definitely
5 asked whether he's registered. I think Maiden was asked that.

6 THE COURT: I got to confess, it easily could have
7 happened, I just don't remember. Listen, if it's going to be
8 an issue about whether he was a registered investment adviser,
9 I guess I could introduce that concept.

10 MR. JACKSON: I plan to take another look at the law
11 tonight to verify that's accurate, but I don't plan to make any
12 argument about his registration status.

13 MR. NAFTALIS: Is anyone going to challenge investment
14 adviser, quote, unquote, investment adviser? Because in the
15 page 36 of our proposed charge, keep in mind that whether a
16 person or entity is a, quote, investment adviser is a different
17 issue than whether or not the person or entity is registered as
18 an investment adviser -- capital I, capital A -- you are
19 instructed that registration with the U.S. Securities &
20 Exchange Commission as a lower case investment adviser is not
21 required for you to find that a person is an investment
22 adviser.

23 THE COURT: I don't see how this issue is going to be
24 presented to the jury, because when I discuss in the first
25 element -- the first element is Maiden's status as an

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1 investment adviser, and I instruct the jury -- I don't say
2 anything about whether he was registered or not, I just say
3 that you should think about or you should consider whether
4 Maiden provided advice or was an adviser who issued reports or
5 analysis regarding securities, whether Maiden was in the
6 business of providing such advice, and whether Maiden was
7 provided compensation for such advice. So that is what the
8 jury is told how they're supposed to resolve the issue. If
9 someone starts talking about he wasn't a registered investment
10 adviser, there's no instruction that deals with that.

11 MR. NAFTALIS: That's fair, your Honor. If they don't
12 argue it, we don't care.

13 THE COURT: Do you want to look at the law?

14 MR. JACKSON: I'm saying I'm not going to argue that.
15 I will say I will verify -- I will concede I had planned to
16 argue he was not an investment adviser, but Mr. Naftalis raised
17 a good point, and based on the way he operated, I probably
18 could argue he wasn't really an investment adviser, but I'm not
19 making that argument.

20 THE COURT: You would rather talk about a switch.

21 MR. JACKSON: Exactly.

22 MR. NAFTALIS: Only in North Carolina is \$20 million a
23 hedge fund.

24 THE COURT: Exactly. So if you have an epiphany
25 overnight that you want to get into the registered investment

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1 adviser thing, otherwise --

2 MR. JACKSON: I have no plan to argue registration.

3 THE COURT: Anyone else on aiding and abetting
4 investment adviser fraud?

5 MR. NAFTALIS: No, your Honor.

6 THE COURT: That brings us to Count Four.

7 MR. WEITZMAN: Your Honor, on Count Four I can jump to
8 the market manipulation part of the instruction, which is on
9 page 58 and 59.

10 THE COURT: Does anybody have anything before 59?

11 MR. JACKSON: No, your Honor.

12 MR. NAFTALIS: Yes, your Honor.

13 THE COURT: Okay.

14 MR. NAFTALIS: I'm trying to -- I think it's before
15 the second element.

16 MR. JACKSON: Which page?

17 MR. NAFTALIS: It was 57 of the draft we had last
18 night, so it's -- does the numbering change? I guess alleged
19 market manipulation comes before knowledge and intent, so right
20 in the paragraph, your Honor, on page 58 of current draft,
21 right after the paragraph where it says nor does it matter.

22 THE COURT: Sorry, what section are we?

23 MR. NAFTALIS: Right before you start the alleged
24 market manipulation, we would suggest adding from our proposed
25 charge page 49 to 50 where there are examples of whether a

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1 misstatement or omission is -- what makes it material. So our
2 charge on 49 in the paragraph starts in assessing whether a
3 misstatement or omission is material, both quantitative and
4 qualitative factors should be considered, and it spills over to
5 50.

6 MR. WEITZMAN: Your Honor, I object to that within the
7 Count Four context. That really is a Count Six concept. Count
8 Four is really just market manipulation, so it's not about
9 whether one meets analysts consensus or misstates income or the
10 like, it would be very confusing to include it in the market
11 manipulation count.

12 MR. NAFTALIS: This is incorporated into the
13 securities fraud construction.

14 THE COURT: Maybe that's an argument that I need to do
15 something different in Six, Count Six, but I tend to agree with
16 Mr. Weitzman that Count Four is about pumping up the stock and
17 the trading volume. And so I take your point, Mr. Naftalis,
18 that there may be an issue when I get to Count Six, and
19 that's -- you may be right, that needs to be addressed, but I
20 would be reluctant to drop this into Count Four because Count
21 Four is -- I think everybody agrees what Count Four is, it's
22 relatively straightforward.

23 MR. NAFTALIS: We agree.

24 THE COURT: So we might have to fix something when we
25 get to Count Six, but that's the way I prefer to approach it is

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1 to fix Count Six, not muck around with Count Four.

2 MR. WEITZMAN: Your Honor, I have two essential
3 points, one I think market manipulation is a very confusing
4 subject in the context of the facts of this case. And we went
5 back to the case law we found, and in addition to case law we
6 didn't find any very illuminating jury instructions, as your
7 Honor noted.

8 We did find an SEC request for a jury instruction, and
9 I thought it was -- I thought it highlights that there needs to
10 be a robust instruction on market manipulation. And I'm happy
11 to pass that up to your Honor. And I think that your Honor is
12 getting -- this is much more robust than earlier drafts, and I
13 very much appreciate that. This is from the case of *SEC v.*
14 *Whitmore*, 05 CV 869, in the District of Columbia, and if I may
15 pass it up, your Honor.

16 THE COURT: Yeah, sure.

17 MR. WEITZMAN: And here's the -- even before your
18 Honor reads it, in the first paragraph there was an emphasis
19 that the sole purpose of the trading has to be manipulative.
20 And it's an important thing that need to be emphasized in the
21 context of our instruction because Maiden, we believe, engaged
22 in bone fide purchases of the stock. And because it's over the
23 counter, it's inevitable that sometimes a large purchaser will
24 have an affect on the stock price, but that doesn't make it
25 market manipulation.

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1 And there's no evidence in the record -- in fact, I
2 think it's a real Rule 29 issue but there's no evidence in the
3 record, in my opinion, that Kaleil really knew Mr. Maiden's
4 trading strategies and what he was doing on a day-to-day basis.
5 At a minimum, I think the instruction needs to be amended to
6 reflect this conflict between legitimate economic trading.

7 THE COURT: I tried to address that.

8 MR. WEITZMAN: I know you did, your Honor, and I have
9 two small edits that I think would capture what is in the case
10 law.

11 On page 59, in the sentence that starts with
12 "accordingly."

13 THE COURT: Right.

14 MR. WEITZMAN: I would propose the following:
15 Accordingly, the government must prove beyond a reasonable
16 doubt that each defendant agreed to engage in conduct with the
17 sole intent of creating a false impression of market activity
18 regarding KIT Digital stock, and with the intent -- with the
19 sole intent to artificially -- I would take "solely" out, with
20 the intent to artificially distort the price of the KIT Digital
21 stock, rather than for legitimate investment or other economic
22 reasons. And those are -- I'm taking it out of the cases that
23 we cited in our instruction, in particular --

24 THE COURT: I don't see any cases cited in your
25 instruction.

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1 MR. WEITZMAN: In our request to charge.

2 THE COURT: Not in what you --

3 MR. WEITZMAN: I misspoke, your Honor, in the request
4 to charge that we submitted way back when, we cited a number of
5 cases on page 65. 65, for example, *In Re College Bound*
6 *Consolidated Litigation*, which is a Judge Mukasey ruling,
7 specifically said as a preliminary matter, the complaint --
8 this was a 10(b) complaint -- the complaint must state clearly
9 that Work Shafts, which were the defendant, purchased College
10 Bound shares with the quote, unquote, sole intent of raising
11 the price of the stock.

12 And then similarly, in *SEC v. Masri*, the court, which
13 is an SDNY court, it was Judge Holwell, said if a transaction
14 would have been conducted for investment purposes or other
15 economic reasons, and regardless of the manipulative purpose,
16 then it can no longer be said that it is artificially affecting
17 the price of the security or injecting inaccurate information
18 into the market.

19 All of this arises out of the Second Circuit's case in
20 *Mulheren*, which is 938 F.2d 364, and in that case, the Second
21 Circuit expressed quote, unquote, misgivings about the
22 government's view of the law, and then it says, however, that
23 it will assume, without deciding on this appeal, that an
24 investor may lawfully be convicted under Rule 10(b)(5), where
25 the purpose of his transaction is solely to affect the price of

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1 the security.

2 So the district courts have latched onto that because
3 there are so many times that people engage in legitimate
4 economic trading that has the effect of increasing or
5 depressing the stock price. For example, you could engage in a
6 huge short sell and it would depress the stock price, but it's
7 legitimate. That's why often the market manipulation cases are
8 brought against individuals who put out false information, who
9 engage in pump and dumps, who have fake transactions or wash
10 trades through multiple brokerage accounts.

11 THE COURT: I don't need to hear this, I can absorb
12 the point. I think really the only issue is sole intent, and
13 there seems to be substantial support in the case law for that.

14 I mean I intended to get at this point, so I think
15 that really all we're talking about is degree. The concept is
16 already there, and I agree that the concept -- I agree with you
17 that the concept has to be there. You want to make it
18 stronger.

19 MR. WEITZMAN: I do.

20 THE COURT: I understand that. You cited some case
21 law to the proposition it should say sole intent, which is
22 certainly stronger than what I said.

23 MR. NAFTALIS: Your Honor, I think your instruction is
24 clear on page 59, the purchase or sale of stock -- you contrast
25 legitimate economic reasons with the accordingly the government

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1 must prove beyond a reasonable doubt that each defendant agreed
2 to engage in conduct that was intended. So I thought there was
3 supposed to be the contrast.

4 THE COURT: This is what I'm going to do, if the
5 government wants to challenge "sole," I'm happy to see contrary
6 authority, but I have seen enough authority to believe that the
7 use of "sole" is appropriate.

8 MR. WILLIAMS: Could we, your Honor, if we could, with
9 the Court's indulgence get the citations for the cases?

10 THE COURT: They're in his original filing. I was
11 just looking at them. Mr. Weitzman, do you want to give the
12 page number again?

13 MR. NAFTALIS: We have it, your Honor.

14 THE COURT: It's *Mulheren* and progeny basically.

15 MR. NAFTALIS: Your Honor, I can't claim I'm familiar
16 with the cases, but I don't think that we have the concept of
17 sole, but sole seems to be very -- I don't know if we like the
18 word "sole," but we understand the concept.

19 MR. WILLIAMS: To be precise about it as well, if, for
20 instance, if you have an intent to manipulate the price and
21 also to reap some sort of benefit from that manipulation, you
22 have multiple intents. And so we want to know whether when you
23 say "sole intent," you also have other language to make clear
24 that it doesn't mean that you can't have multiple motives in
25 engaging in market manipulation.

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1 MR. NAFTALIS: Typically manipulate the price to hope
2 to make some money at some point.

3 THE COURT: Let me read the sentence to you and tell
4 me if you have a problem. Accordingly, the government must
5 prove beyond a reasonable doubt that each defendant agreed to
6 engage in conduct with the sole intent to, one, create a false
7 impression of market activity regarding KIT Digital stock, and
8 two, to artificially distort the price of KIT Digital stock
9 rather than for legitimate investment purposes.

10 MR. JACKSON: It's very clear.

11 MR. WEITZMAN: That's acceptable to us.

12 MR. WILLIAMS: I think that's fine. If we have a
13 question with "sole" --

14 THE COURT: You can come back, yeah.

15 All right. What's next?

16 MR. JACKSON: My next issue isn't until 69, your
17 Honor.

18 THE COURT: Anyone have anything between 59 and 69?

19 MR. NAFTALIS: Well, that take us into the section
20 about -- I think we have an issue on -- I have not read your
21 statute of limitations, if you changed it, your Honor.

22 THE COURT: I did change it.

23 MR. WEITZMAN: Yes, your Honor, I think we already
24 stated our position, but we reiterate our position from this
25 morning on the statutes of limitations.

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1 THE COURT: Let's find that page, it's page 62, and I
2 have changed it from the last draft, and I have keyed it to the
3 need for there to be an overt act after August 12, 2010.

4 What we were talking about this morning, Mr. Weitzman,
5 is your point that where the objective of the conspiracy has
6 been met, the conspiracy is over. And it's your contention
7 that the objective of the conspiracy was obtained or achieved.
8 What I will say to you is that concept, as I told you this
9 morning, is in the general conspiracy language that I present
10 in connection with Count One. And it probably won't satisfy
11 you, but I want you to know that it is in there.

12 MR. NAFTALIS: Your Honor, page 41 of your charge.

13 THE COURT: Thank you, Mr. Naftalis.

14 And this is just common boilerplate that we're all
15 familiar with, but it says on page 41: A conspiracy, once
16 formed, is presumed to continue until either its objective is
17 accomplished or there is some affirmative act of termination by
18 its members.

19 So to the extent you wanted to argue to the jury that
20 the objective of the conspiracy has been accomplished, and
21 therefore the conspiracy sort of self-destructed, there's
22 language in the charge to support that. But I'm open, if you
23 have other ideas, if you have things you want to say and you
24 want me to say in the statute of limitations section about that
25 thought, I'm happy to consider it.

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1 MR. WEITZMAN: Yeah, I think there needs to be some
2 tie to indicate that that is a trigger for the statutes of
3 limitation because right now one doesn't trigger the other.
4 And let me consider what language.

5 THE COURT: I guess only in the negative, right?
6 Because if you're still committing overt acts, then that would
7 suggest that the objective of the conspiracy has not been
8 realized.

9 MR. WEITZMAN: Well, I think that's actually a dispute
10 for us, which is we think that, at most, the government's
11 evidence shows that there was a conspiracy -- we dispute it,
12 but a conspiracy until the NASDAQ listing. What Maiden does
13 afterwards is his own thing. The guy is a rampant market
14 manipulator. So the fact that he is still manipulating or
15 attempting to manipulate has nothing to do with the conspiracy,
16 the statute of limitations has to begin when the object -- when
17 the purpose of the conspiracy is accomplished. That's the
18 issue for us.

19 MR. NAFTALIS: Your Honor, I think we covered this.
20 Seems like forever ago, maybe this morning, but I think this is
21 their theory of what the conspiracy is, that's not what the
22 evidence is. We think the instruction as you wrote it is
23 correct and it's consistent with what Sand has.

24 THE COURT: As I said, we're looking at the page,
25 Mr. Weitzman, is there -- what do you want me to say in

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1 addition to what I have said?

2 MR. WEITZMAN: I would like in addition that says --
3 and I'm spit-balling here, your Honor, a bit -- the statute of
4 limitations begins to run when the purposes of the conspiracy
5 have been accomplished or abandoned.

6 MR. NAFTALIS: Your Honor, my recollection of
7 researching this last night is that courts have cautioned
8 against explaining legal concepts like when the statute of
9 limitations starts to run. And the issue really is there just
10 has to be one overt act for purposes of getting over the
11 hurdle.

12 THE COURT: Actually, as I think about it, I'm not
13 even sure I want the heading statute of limitations here. I
14 don't want to inject legal concepts such as statute of
15 limitations unnecessarily into the case. And so I'm not -- as
16 I think about it, I'm not even happy with having the heading
17 statute of limitations. I need the jury to make a factual
18 finding here, and that's what I want them to focus on, and it's
19 not even important for them to know what the significance of
20 the factual finding is.

21 MR. NAFTALIS: Maybe your Honor entitle it overt act
22 after August 12, 2010, because we're within the overt act
23 section. It's not E really, it's really within D.

24 It either could be E and call it the fourth element,
25 or just sort of a further refinement, the third element.

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1 MR. WEITZMAN: I would prefer that it stand on its own
2 as an element that has to be proven beyond a reasonable doubt.

3 THE COURT: So the new heading will be overt act after
4 August 12, 2010. Why don't I say requirement.

5 MR. JACKSON: That's perfect.

6 MR. NAFTALIS: That's fine.

7 THE COURT: Requirement of overt act after August 12,
8 2010.

9 MR. WEITZMAN: And your Honor, I still reserve on the
10 additional language. I would request -- and I understand your
11 Honor's ruling, I do think it would be appropriate to add in
12 the last line of the charged conspiracy to manipulate the word
13 "charged," so that it's -- so that the jury can't think of --

14 THE COURT: Sorry, I'm losing you.

15 MR. WEITZMAN: In the last line of the section before
16 the word "conspiracy" I would add "charged conspiracy."

17 THE COURT: Sorry, where is that?

18 MR. WEITZMAN: The statute of limitations section, the
19 last line it says conspiracy to manipulate the market.

20 THE COURT: Yes.

21 MR. WEITZMAN: I would add "charged conspiracy."

22 THE COURT: Okay.

23 MR. NAFTALIS: That's fine.

24 THE COURT: Yes. Okay, I added that.

25 MR. WEITZMAN: And I do have, as your Honor -- now

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1 that your Honor pointed me out to page 41, in the last line of
2 that section, your Honor pointed out regarding withdrawal, I
3 would request that we include language to the effect which
4 comes out of the government's citation of *Borelli*, 336 F.2d
5 376, unless it is shown by some affirmative proof that he
6 withdrew and disassociated himself from it or communicated the
7 abandonment in a manner reasonably calculated to reach
8 co-conspirators. That is the language that the government
9 included in its letter. And I think that when a co-defendant
10 tells others I'm no longer part of your conspiracy, for
11 example, and he's withdrawn from it, I would like to put that
12 gloss of it. It's not just cessation, we believe Kaleil
13 communicated it to Mr. Maiden.

14 THE COURT: And you said you're citing the
15 government's what?

16 MR. WEITZMAN: The letter they put in last -- I think
17 it was last night, it's docket 612, and on page 4 in the middle
18 of the paragraph that starts with "Second."

19 THE COURT: I have a December 19 letter from the
20 government, it's only three pages, so I must not be looking at
21 the right one.

22 MR. WEITZMAN: I'm happy to pass it up.

23 THE COURT: Okay.

24 (Pause)

25 THE COURT: So you want me to add to the end something

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1 along the lines of: Such as a communication of abandonment in
2 a manner reasonably calculated to reach co-conspirators?

3 MR. WEITZMAN: Yes, your Honor.

4 THE COURT: Do you have a problem with that?

5 MR. NAFTALIS: No.

6 THE COURT: Then I will add it on page 41.

7 So now we're back to I think it's page 62. Anything
8 else on 62?

9 MR. NAFTALIS: No.

10 THE COURT: 63?

11 MR. NAFTALIS: I think, your Honor, the first
12 paragraph on 63, we have the same issue with how the wire fraud
13 is defined. So it just mirror your Honor's edits, it's just
14 not the arm's length issue.

15 THE COURT: Could someone refresh my memory what page
16 that was?

17 MR. NAFTALIS: I believe it was on page 22. Excuse
18 me --

19 THE COURT: Yes, I think you're right, sir.

20 MR. NAFTALIS: 24, excuse me.

21 THE COURT: Yes, page 24. I added: The government
22 also alleged that Mr. Tuzman falsely represented KIT Digital
23 that a \$250,000 KIT Digital investment to Maiden Capital was a
24 legitimate investment, whereas Mr. Tuzman and Maiden had agreed
25 it was instead to be paid to Tuzman for his personal use.

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1 That's what you want added on page 63, right?

2 MR. NAFTALIS: Correct.

3 MR. WEITZMAN: Your Honor, I may be misrecollecting, I
4 don't recall Irfan Amanat charged in this count. Do you guys
5 recall?

6 MR. NAFTALIS: Count Five?

7 MR. WEITZMAN: Yeah, I think I see his name. I don't
8 see it in the indictment.

9 THE COURT: Sorry, what's the problem with Count Five?

10 MR. WEITZMAN: I think in the first paragraph on page
11 63 it says Irfan Amanat is charged in Count Five, and I don't
12 believe he is.

13 MR. NAFTALIS: That's right, he's not.

14 THE COURT: I was trying to find my copy of the
15 indictment, but of course I can't find it.

16 He's not actually charged in Count Five?

17 MR. JACKSON: He is not, your Honor.

18 MR. NAFTALIS: No, he's not.

19 THE COURT: So I should strike that. So it's just --
20 it should just say the top of page 63: Mr. Tuzman and others
21 conspired to commit wire fraud?

22 MR. NAFTALIS: I think that's right, your Honor.

23 THE COURT: All right. I made that change.

24 Anything else on 63?

25 MR. WEITZMAN: No, your Honor.

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1 THE COURT: 64?

2 MR. WEITZMAN: Your Honor, I just want to preserve the
3 requests I made under Count One and incorporate them here. I
4 understand your Honor has already ruled.

5 THE COURT: Could you refresh my memory?

6 MR. WEITZMAN: Yeah, this was about whether the scheme
7 to defraud intended to deprive the victim.

8 THE COURT: Oh, yeah.

9 MR. WEITZMAN: Whether it was an essential element.

10 THE COURT: Yes, that argument is preserved.

11 MR. NAFTALIS: Your Honor, our next edit is 66.

12 THE COURT: All right, on 66.

13 MR. NAFTALIS: I think in the first object, this would
14 be the part to include more description of what it means to be
15 material.

16 THE COURT: Yes.

17 MR. NAFTALIS: I'm trying to find it in our charge.

18 THE COURT: Tell me what those pages were again? You
19 said that they were 49 and 50, right?

20 MR. NAFTALIS: 49 to 50, yes.

21 THE COURT: So I could say something here like I want
22 to expand, however, on my discussion of what is material.

23 MR. NAFTALIS: That's fine.

24 THE COURT: Do you have any problem, Mr. Weitzman,
25 with my including examples that are on pages 49 and 50 of the

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1 government's request to charge, document number 391?

2 MR. WEITZMAN: I actually would recommend going
3 broader.

4 THE COURT: Okay.

5 MR. WEITZMAN: Which is a know is a rare defense
6 request, but I think the paragraph before the example needs to
7 be included as well.

8 MR. NAFTALIS: We agree, the qualitative and
9 quantitative?

10 MR. WEITZMAN: Yes.

11 THE COURT: That paragraph, the next paragraph.
12 Anything else?

13 MR. NAFTALIS: We suggest to the end, which goes to
14 the top of 51.

15 MR. WEITZMAN: I would stop after the bullet points.
16 I don't think there's been any evidence about effects on the
17 price of stock. No one has put in expert testimony on that. I
18 think it injects an issue that is not really in play here.
19 There's been no -- I know that Mr. Naftalis believes event
20 studies are junk science, but there's been no event study to
21 discuss the issue, so I think it's unnecessary. I would just
22 stop at the bullet points.

23 MR. WILLIAMS: I may agree, I'm reading this quickly.

24 MR. NAFTALIS: I would add: This list is not
25 exhaustive.

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1 MR. WEITZMAN: That's fine with me.

2 THE COURT: So it will end with this is not an
3 exhaustive list, period?

4 MR. NAFTALIS: Right, that first sentence.

5 THE COURT: Do you want the whole first sentence?

6 MR. NAFTALIS: It doesn't matter to us. The fact it's
7 not exhaustive is fine.

8 MR. WEITZMAN: I would stop at this is not an
9 exhaustive list.

10 THE COURT: So it would end with this is not an
11 exhaustive list, period.

12 What's next?

13 MR. JACKSON: My next issue is on 69. I don't know if
14 anyone has anything before that.

15 THE COURT: Anyone have anything before 69?

16 MR. WEITZMAN: At this point I don't think I have
17 anything, but I'm continuing to skim it.

18 MR. NAFTALIS: On page 68, your Honor, I would just
19 say -- you write I have defined the term material for you in
20 connection with Count Four and this count.

21 THE COURT: Sorry, where are you?

22 MR. NAFTALIS: The top of 68. Now that we have
23 included more materiality definition, just you say I have
24 defined the term "material" for you in connection with Count
25 Four and this count.

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1 THE COURT: I have defined the term "material" for you
2 in connection with Count Four and in connection with this
3 count, period, right?

4 MR. NAFTALIS: Correct.

5 THE COURT: Okay.

6 MR. JACKSON: Your Honor, at 69, in the multiple
7 conspiracies charge --

8 THE COURT: Yes.

9 MR. JACKSON: -- the only change, your Honor, we would
10 ask for is in the first sentence after "but instead has offered
11 proof," we would ask for the clause that "even if the
12 government's allegations are accepted, at best," and then the
13 rest of the Court's language shows several separate and
14 independent conspiracies with different members.

15 We just don't want the sentence to read as though we
16 are conceding that they established.

17 (Continued on next page)

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1 THE COURT: All right. I need to fix that. I see
2 your point. I need to fix it.

3 How would you feel about, "With respect to Counts One,
4 Four and Six, Mr. Tuzman and Mr. Amanat contend that the
5 government has not proven the single conspiracy charged in each
6 count, but at best, has offered proof showing several separate
7 and independent conspiracies with different members"?

8 How would you feel about that?

9 MR. JACKSON: I think that's fine for me, your Honor.

10 MR. WEITZMAN: That's fine, your Honor.

11 MR. NAFTALIS: That's fine.

12 THE COURT: OK.

13 MR. WEITZMAN: Your Honor, I think it's not in the
14 instructions, I'm sure your Honor considered our request, but
15 so that I can preserve our rights, we requested in request No.
16 47 an instruction on "standards unclear."

17 THE COURT: Yes.

18 MR. WEITZMAN: This was on page 88, and I think that
19 the trial record now supports that instruction.

20 THE COURT: I need to get your charges in front of me.
21 I know they're around here somewhere. Hold on a second.

22 MR. NAFTALIS: And your Honor, we responded in a
23 letter I just handed up last night.

24 THE COURT: Yes.

25 What page should I look at, Mr. Weitzman?

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1 MR. WEITZMAN: Page 88 of our requests to charge.

2 THE COURT: All right. It's request No. 47 in
3 Tuzman's proposed jury instructions, docket No. 403.

4 And you were saying, Mr. Naftalis, you had addressed
5 this in a letter. Which letter was it?

6 MR. NAFTALIS: The one that we handed up that we sent
7 in last night. I think it's the third point.

8 THE COURT: Yes. OK. Let me just read it.

9 Yes. I understand you want to preserve the point, Mr.
10 Weitzman, and you have. I do agree with the sentiments
11 expressed in the government's December 19 letter that the way
12 the case has been tried, the issue is whether Mr. Tuzman was
13 aware that fake revenue was included in KITDigital's SEC
14 submissions as well as the information that was provided to the
15 auditors.

16 I don't think this is a case that turns on the
17 application of accounting rules. It's a much more
18 straightforward case in which the defendant is arguing that he
19 was not aware of the fraud being perpetrated by Smyth and
20 Campion.

21 MR. WEITZMAN: It is absolutely correct, your Honor,
22 that that is our defense on the revenue recognition portion of
23 the case. The problem is that the government has charged a
24 broader case in Count Six.

25 In particular, the government alleges that my client

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1 deceived auditors, shareholders and others regarding the
2 related-party nature of transactions with Maiden Capital.
3 Mr. Halkias, that outside auditor, specifically testified that
4 "there is no single," and this is a quote, "single best source
5 for a definition of related party," that it's discussed in
6 "numerous places in our professional literature," and both he
7 and Mr. Rocco acknowledged that it's a very complicated
8 question. That's a direct quote.

9 My client was not a CPA, and unless they're abandoning
10 and there's an instruction that they can't consider the
11 related-party disclosure issues as part of Count Six, I don't
12 think it's appropriate to charge my client with knowledge of
13 this very complex issue.

14 MR. WILLIAMS: Your Honor, I think he's in the wrong
15 count. Count Six does not include any discussion of
16 related-party transactions. Count Five in the indictment
17 concerns the relationship between Maiden Capital and the
18 defendant, and so that's where the language of related party
19 comes in.

20 Count Six is focused on the company's financial
21 performance and revenue recognition and the like, and the Court
22 is correct that the government's proof is largely about fake
23 transactions, so there's no ambiguity there.

24 Count Five does mention related party, and if they
25 want to tell the jury that there's no one, clear definition,

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1 they can do that. There's evidence in the record of that, but
2 we don't think that necessitates a separate instruction.

3 MR. WEITZMAN: Your Honor, I think the instruction is
4 then, appropriate for Count Five. They're still charging my
5 client with fraud based on unclear accounting standards.

6 MR. WILLIAMS: We think that argument's available to
7 them based on the record. That doesn't mean that an
8 instruction is warranted.

9 THE COURT: I'm sorry?

10 MR. WILLIAMS: I said they can certainly make the
11 argument based on the evidence in the record, but we don't
12 think that a separate instruction is required.

13 THE COURT: What do you say to his argument that
14 there's been testimony from the outside auditor that the whole
15 related-party issue is a complicated one? What's your response
16 to that?

17 MR. WILLIAMS: The way that we have charged the case,
18 and I think the testimony from the auditor, Mr. Halkias, was
19 that there's no one definition of what it means to be a related
20 party. However, based on the definition that he was relying
21 on, he was asking the defendant certain questions about his
22 relationship with Stephen Maiden in order to make an
23 assessment, and so Mr. Halkias, I thought, was pretty clear as
24 to what he believed the definition was that he was operating
25 under, and they can certainly argue to the jury that, Look, my

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1 client didn't know what he actually had to tell Mr. Halkias
2 because of the ambiguity around what it means to be a related
3 party, but we don't think that that does all the work that he
4 thinks it does.

5 THE COURT: Let me ask you this. Is it part of the
6 government's theory on Count Five that Mr. Tuzman should have
7 told the auditor that Maiden Capital was a related party?

8 MR. WILLIAMS: For Count Five specifically, Michael
9 Halkias asked Tuzman in August of 2009, Tell me about your
10 relationship with Maiden Capital, and the defendant responded
11 with just a boatload of lies about that.

12 THE COURT: Right.

13 MR. WILLIAMS: The whole point was for Halkias to then
14 do an assessment as to whether it was a related party.

15 THE COURT: I have to say, Mr. Weitzman, I don't think
16 the theory on Count Five involves some arcane interpretation of
17 related-party transactions. It's going to be premised on, as
18 Mr. Williams just said, the allegation that Mr. Tuzman flat out
19 lied about what his relationship was with Maiden Capital,
20 period.

21 I just don't see Count Five turning on potentially
22 unclear accounting standards about who is a related party and
23 who is not. I think the proof on that is much more
24 straightforward. Either the jury believes it or it doesn't.
25 They're welcome to reject it, obviously, but it doesn't turn on

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1 the application of rules regarding related parties, rules that
2 may be unclear. It turns on the claim that when questioned
3 about his relationship with Maiden Capital, he told numerous
4 lies.

5 MR. WEITZMAN: I actually don't think that there's an
6 allegation that he told numerous lies. I think there's one
7 sentence that they focus on, which is whether there was a
8 relationship or suasion regarding buying activity. Nothing
9 else, to my knowledge, in that email is allegedly false. That
10 said, your Honor --

11 THE COURT: Do you want to address that?

12 MR. WILLIAMS: This is what summation is for. There's
13 plenty more.

14 THE COURT: That's my recollection, but go ahead, Mr.
15 Weitzman.

16 MR. WEITZMAN: I appreciate that.

17 In any event, the context of the email is that
18 Mr. Halkias was trying to make a related-party determination,
19 so I think what Mr. Isaza Tuzman's understanding, if any, of
20 what a related-party transaction is is intertwined with his
21 representations.

22 THE COURT: But there isn't any evidence. There's
23 nothing in the record about what his understanding was about
24 related-party transactions one way or the other.

25 MR. WEITZMAN: I agree with that. And that's why I

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1 think that the "standards unclear" instruction is appropriate,
2 because this is a complexity.

3 THE COURT: But that just proves the inapplicability
4 of it, because if your client doesn't have any idea what the
5 standards are, it really doesn't matter whether they're clear
6 or unclear, and in any event, that's not the government's
7 theory anyway. The government's theory is when questioned
8 about the relationship -- you say it was one lie, they say it
9 was multiple lies. There's evidence in the record. The jury's
10 free to disregard it or decide it's not reliable, but there's
11 evidence in the record that when questioned about his
12 relationship with Maiden, he did not respond truthfully. I
13 don't see that as implicating related-party rules. You've
14 preserved the point, but your objection is overruled.

15 MR. WEITZMAN: Thank you, your Honor.

16 THE COURT: We're still on multiple conspiracies.
17 Anything else on that?

18 MR. JACKSON: Nothing from me, your Honor.

19 THE COURT: OK. Then we're at background and motive
20 evidence.

21 MR. JACKSON: I think the Court's charge on this is
22 excellent.

23 THE COURT: Any other comments?

24 MR. WEITZMAN: Your Honor, I'm just reading through it
25 now.

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1 THE COURT: Yes, go ahead.

2 MR. WEITZMAN: I guess the only question is whether
3 this is really only applicable to Counts One through Three. I
4 think the government's theory is that it's applicable to Count
5 Four as well, for example, maybe even Count Five, because it's
6 incorporated.

7 MR. WILLIAMS: Your Honor, that's actually correct.
8 When the evidence was -- I don't know if you'll recall; it's
9 been so long ago. When the Court first instructed the jury as
10 to how they would be able to consider this background evidence,
11 Mr. Jackson wanted it only to be as to Counts One through
12 Three. We said it was admissible as to Four and wanted Four in
13 the instruction as well. We compromised and left it as One
14 through Three, but technically, the government offered the
15 evidence on this background to all four counts, One through
16 Four.

17 We didn't think that -- frankly, the instruction
18 itself can be broadened to include Count Four, but it would
19 make the instruction a lot more complicated because you'd have
20 to bring up the fact that he's also charged in Count Four along
21 with Mr. Isaza Tuzman, so a lot would have to be changed.

22 MR. JACKSON: Your Honor, I'm sorry.

23 MR. WEITZMAN: Can we pause a second? I'd like to
24 just talk to Mr. Jackson.

25 THE COURT: Let me make an observation. I just don't

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1 know how much the background evidence has to do with Count
2 Four.

3 MR. JACKSON: Exactly, Judge.

4 MR. WEITZMAN: I may be in agreement on this one. I'd
5 like to talk to Mr. Jackson for a moment.

6 MR. JACKSON: Your Honor, we think that the Court's
7 last point is the correct point, and this instruction, I think,
8 as clearly as possible addresses what is a little bit of a
9 complicated issue and protects everyone's interests and gives
10 the government the appropriate ability to make the arguments
11 they need to make about this evidence.

12 MR. WILLIAMS: Your Honor, one of the reasons we
13 didn't suggest making it abundantly clear that it's applicable
14 as to Count Four is that we think that the way that the
15 language is right now, we would be able to rely on the evidence
16 as background anyway. It's all one, continuous course of
17 events. We think it is relevant to Count Four in particular
18 because Omar Amanat, knowing that there's an Enable hole,
19 knowing that the money is gone or "locked up," as Mr. Jackson
20 would say, is highly incentivized to keep Stephen Maiden in
21 pocket; not have him redeem his Enable investment; incentivize
22 him to manipulate the KITDigital stock at a time when that
23 would be to Maiden's economic benefit and Omar Amanat's
24 economic benefit, and so on and so forth. It's kind of of a
25 piece with the same motive evidence that is applicable to

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1 Counts One through Three. That's why we think it's admissible
2 to Count Four or relevant to Count Four.

3 MR. WEITZMAN: I'm fine with it as is, your Honor. I
4 have no request.

5 MR. JACKSON: And I'm not going to object to any
6 motive arguments.

7 MR. WILLIAMS: And that's fine. If no one's going to
8 object if we say it, then we don't think the instruction needs
9 to be changed.

10 THE COURT: Right. I mean, you're going to make the
11 motive argument, and everybody knows that. It's not a
12 surprise. You've been very consistent with your theory.

13 MR. WEITZMAN: Your Honor, can I ask a question?

14 THE COURT: Yes.

15 MR. WEITZMAN: I can't recall, but did your Honor
16 repeat the instruction regarding --

17 THE COURT: Consciousness of guilt?

18 MR. WEITZMAN: Yes.

19 THE COURT: But I did it in the first section, at the
20 end.

21 MR. JACKSON: Yes, we saw it there.

22 MR. WEITZMAN: I see it. Pages 18 and 19.

23 THE COURT: Yes.

24 MR. WEITZMAN: Thank you, your Honor.

25 MR. JACKSON: Your Honor, it seems like we're at the

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1 end. I have one other issue, and I know that the Court has
2 already looked at this very closely, but I wasn't sure if we
3 were going to circle back to it.

4 I do believe that for venue in a wire fraud case, the
5 government has to establish that a wire either originated,
6 terminated or passed through the Southern District of New York.
7 I don't know if the Court has already made a determination
8 about that, but I think that that is the law.

9 THE COURT: Are you requesting that I add language?

10 MR. JACKSON: Yes, your Honor.

11 THE COURT: Are you requesting that I add language to
12 the charge?

13 MR. JACKSON: Yes, your Honor.

14 I think just circling back. I thought when we were
15 discussing venue before, I thought perhaps there was an
16 additional instruction and I just missed that, but if we could,
17 on 41, just add that with regard to wire fraud, the government
18 is also required to demonstrate that a wire, an interstate wire
19 either passed through, originated or terminated in the Southern
20 District of New York.

21 MR. WILLIAMS: Your Honor, I thought you covered that
22 on page 44, the top paragraph.

23 THE COURT: Right. Do you believe that that's
24 inadequate, Mr. Jackson?

25 MR. JACKSON: I do, your Honor. I think that 44 says:

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1 "The government must prove that an act in furtherance
2 of the alleged unlawful activity occurred within the Southern
3 District of New York. Such act would include, for example, the
4 placing of a telephone call or an electronic communication to
5 or from the Southern District of New York."

6 I think that that's all accurate, but I think that
7 there is a specific requirement that at least one of the
8 interstate wires go through the Southern District of New York,
9 so I think in the venue instruction on 41, we just need one
10 more sentence that says with regard to wire fraud, the
11 government is also required to prove that an interstate wire
12 either originated, terminated or passed through the Southern
13 District of New York.

14 THE COURT: Does the government dispute that?

15 MR. WILLIAMS: No, your Honor, we don't.

16 I think it's a little confusing to have that language
17 on page 41. It should probably go on 44, which is actually
18 Count Two, the substantive wire fraud. And Mr. Jackson's
19 suggestion could be inserted in the venue language in that top
20 paragraph.

21 THE COURT: Do you want it at the top of 44,
22 Mr. Jackson?

23 MR. JACKSON: That's fine with me, your Honor.

24 THE COURT: I'm going to strike "an act in furtherance
25 of the alleged activity." I'm going to strike that and

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1 substitute the wire language that Mr. Jackson just used.

2 Are you OK with that?

3 MR. WILLIAMS: That's fine, your Honor.

4 THE COURT: It will read as follows:

5 "In addition to proving beyond a reasonable doubt all
6 of the elements of wire fraud, as I have explained them to you,
7 the government must prove," and then tell me your language
8 again, Mr. Jackson. "That a wire communication originated,
9 passed through or terminated in the Southern District of New
10 York"?

11 MR. JACKSON: Yes, your Honor. I think it has to be
12 an interstate wire.

13 THE COURT: I'm sorry?

14 MR. JACKSON: An interstate wire in furtherance of the
15 alleged unlawful activity.

16 THE COURT: All right. Let me start over. "Must
17 prove that an interstate wire in furtherance of the alleged
18 wire fraud originated, passed through or terminated in the
19 Southern District of New York."

20 MR. JACKSON: Yes, your Honor. Thank you.

21 THE COURT: And then I'm going to strike the next
22 sentence, which reads, "Such an act would include a telephone
23 call," and then it will pick up with, "As I have instructed you
24 as to venue, and venue alone, the government's burden is proof
25 by a preponderance."

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1 Now, are there modifications necessary in the wire
2 fraud conspiracy instruction?

3 MR. WILLIAMS: We don't believe so, your Honor.

4 THE COURT: OK.

5 MR. WILLIAMS: We do have a question. I just don't
6 recall whether the Court, at another part of the indictment,
7 defined --

8 THE COURT: Another point in the charge?

9 MR. WILLIAMS: I'm sorry.

10 Another point in the charge, defined preponderance of
11 the evidence.

12 THE COURT: Well, I do it here. I say more likely
13 than not. If you look at 44, I say, "As I have instructed you
14 as to venue, and venue alone, the government's burden is proof
15 by a preponderance of the evidence, more likely than not."

16 I think I did define that. Yes, it's on 42, "a
17 preponderance of the evidence means more likely than not."

18 MR. WILLIAMS: Thank you, your Honor.

19 MR. NAFTALIS: Your Honor, we just had a couple more
20 things --

21 THE COURT: Yes.

22 MR. NAFTALIS: -- one of which, and I may have missed
23 it, I'm not sure that the instruction the jury shouldn't
24 consider punishment is in there.

25 THE COURT: It is.

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1 MR. NAFTALIS: It is? OK.

2 THE COURT: I think it's at the beginning. Sympathy
3 or bias, "the question of possible punishment must not
4 enter" --

5 MR. NAFTALIS: There it is.

6 THE COURT: Page 3.

7 MR. NAFTALIS: OK. Understood.

8 And then the last one we had was we had requested a
9 conscious avoidance instruction.

10 THE COURT: Yes, I rejected that, but I'm happy to
11 hear what you have to say. I rejected it. That's why it's not
12 in there.

13 I don't believe that the government's theory is
14 conscious avoidance as to either defendant. The government, as
15 to Mr. Tuzman, is relying on countless emails, which it argues
16 show knowledge and intent and not a closing of the eyes.

17 As to Mr. Amanat, while I can certainly conceive of a
18 case where the theory could have been conscious avoidance, I
19 don't believe that to be the government's theory as to Mr.
20 Amanat. The government has introduced communications from
21 which it argues that he was on notice of what Maiden was doing
22 with his investors. Maiden testified that he discussed with
23 Amanat that he was lying to his investors, and then there's the
24 money that Amanat provided. I didn't see it as a theory that
25 Amanat closed his eyes as to what was going on. It seemed to

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1 me as a case that the government was arguing direct knowledge,
2 and so that's why I eliminated the conscious avoidance
3 language.

4 I'll hear anything more you have to say.

5 MR. WILLIAMS: Your Honor, I think we certainly
6 believe in our proof, and our proof is that both defendants
7 knew and were told, but I think the reason why we are
8 requesting the instruction, and we understand the Court's
9 ruling, is because in the face of that evidence, they are going
10 to tell the jury, Well, look, yes, Kaleil got all these emails
11 talking about round tripping and whatever, but --

12 THE COURT: But they're going to be saying that Smyth
13 and Campion lied.

14 MR. WILLIAMS: Well, no.

15 THE COURT: They lied and it was their scheme; I know
16 nothing about it. They're lying, lying, lying.

17 MR. WILLIAMS: Understood, but there is direct
18 evidence of, for instance, Mr. Isaza Tuzman receiving
19 communications with, for instance, Tomas Petru.

20 THE COURT: Right.

21 MR. WILLIAMS: And they're talking about these loan
22 payments and Smyth saying, I'm sending two payments, send them
23 back to us, and Mr. Isaza Tuzman is on those communications.
24 And they're going to argue, they're going to have to say
25 something about those communications, and presumably they're

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1 going to say something like, Well, there's no evidence that he
2 read it, or There's no evidence that he knew what they were
3 talking about. And that really does tee up the situation where
4 on their face the communications are so suspicious and there
5 are so many red flags that if he doesn't respond saying, Hey,
6 guys, what are you talking about, then that really does go
7 toward conscious avoidance, we think.

8 THE COURT: Hold on a second.

9 Just give me a moment. I had asked my law clerk to
10 retrieve some materials for me on conscious avoidance. I'd
11 like to have them in order to continue the conversation.

12 MR. NAFTALIS: Your Honor, we can hand up a letter.
13 We cited some of the cases. They're just parentheticals. I
14 don't know if it helps you or if you want the full cases.

15 MR. JACKSON: Your Honor, I would just say from our
16 position, I think the way the Court described it a moment ago
17 is exactly correct. This is not a case where the government
18 has introduced proof under a conscious avoidance theory. I
19 mean, there are cases like that, but this is a case where each
20 one of the cooperating witnesses said explicitly that the
21 defendants had joined up with them and the defendants are
22 denying it and are contesting the truth of it.

23 A conscious avoidance instruction is only going to add
24 enormous confusion to the jurors and to, frankly, our jury
25 addresses in terms of explaining what is and what is not at

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1 issue.

2 MR. WEITZMAN: Yes, and on our end, Mr. Smyth and
3 Mr. Campion couldn't have been clearer. Their accusation is
4 that Kaleil effectively forced them, pressured them to commit
5 this fraud, conceived of the fraud, took over the negotiations
6 with Mr. Petru in order to further the fraud.

7 We obviously deny that, but that's not a conscious
8 avoidance theory.

9 THE COURT: It adds a layer of complexity to the
10 instructions. I'm happy to consider anything you want to say
11 or anything you want to submit on it. I did think about
12 conscious avoidance. I took it out because I did not believe
13 it was properly in play in this particular case. If you want
14 me to revisit that, I'm happy to do it. I'm happy to think
15 about it more.

16 MR. WILLIAMS: I think we will, your Honor, because
17 the cases where a conscious avoidance charge has been given, it
18 is not as if the government doesn't have proof that the
19 defendants knew and people told them about the fraudulent
20 activity; it's that they deny knowledge and that we therefore
21 have to battle between a world in which you're told something
22 but you claim you didn't know about the fraud. We think that's
23 this case.

24 For instance, we have evidence of a New York meeting
25 between Smyth, Tuzman and Campion where they discuss that

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1 spreadsheet, and the defendant doesn't deny that he was at that
2 New York meeting but does deny knowing about the fraud. Some
3 of the cases discuss when someone is at a meeting where the
4 fraud is discussed and yet they still claim that they lacked
5 knowledge because they didn't read the documents in full or
6 didn't pick up everything that was being said.

7 THE COURT: But there's utterly no testimony. There's
8 no support for that in the record. I mean, there are certainly
9 cases where a defendant takes the stand and says: "I wasn't
10 paying attention; I didn't read that email; yeah, I was at the
11 meeting, but I wasn't paying attention." That's not the record
12 here.

13 MR. WILLIAMS: We agree, your Honor. What we're
14 saying is --

15 THE COURT: In order for me to give a conscious
16 avoidance charge, and we're going to get the cases in just a
17 minute, but my understanding is in order for me to give a
18 conscious avoidance charge, there has to be a basis in the
19 record from which a reasonable jury could find that the
20 defendant closed his eyes to what was obvious. I don't see
21 that as this case. That's my understanding of the law. I
22 haven't got the law yet, but that's my understanding of it.

23 MR. WILLIAMS: We understand, and we're going to go
24 back and look at the record, but we think that through the
25 cross-examination of our cooperating witnesses, specifically

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1 Smyth, they questioned whether statements made in emails, for
2 instance, if you look at them one way, and one example is,
3 again, going back to that New York meeting, it says 37.6
4 million and then ELEE, and Smyth said that stood for elephant.
5 And then Mr. McRae said that stood for, and then he had some
6 acronym to dispute whether or not that clear on its face that
7 it stood for elephant, so we do think there's some evidence in
8 the record.

9 THE COURT: That doesn't sound like conscious
10 avoidance to me. That sounds like the cooperator is lying.

11 MR. WILLIAMS: OK.

12 THE COURT: That's what it sounds like to me.

13 Actually, their theory was that, No, it wasn't that he
14 didn't notice that it said ELEE. Their theory is that it
15 didn't mean elephant at all.

16 What did you say it meant? You actually came up with
17 an acronym for something, as I recall.

18 MR. WEITZMAN: Yes. Expense ledger for excluded
19 entities.

20 THE COURT: Expense ledger for excluded entities.

21 MR. NAFTALIS: It's a non-GAAP, obviously, fraud.

22 MR. WEITZMAN: Obviously, conscious avoidance is when
23 you pick up a suitcase that someone gives you at the airport
24 and you don't ask any questions, and all of a sudden, it's
25 packed with cocaine. That's conscious avoidance.

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1 THE COURT: And they offer to pay you a lot of money
2 for walking it through customs.

3 MR. WEITZMAN: Exactly.

4 THE COURT: That's not this case. Let's be honest,
5 this case turns on whether they believe the cooperators or not.
6 That's what this case is about.

7 MR. WILLIAMS: Your Honor, I can tell that we're
8 fighting a losing battle here. I will just say so that I can
9 feel comfortable that I've exhausted this, for instance,
10 there's one of the assurance notes that Mr. Isaza Tuzman sent
11 to Mr. Smyth saying, I'm going to send \$8 million in, and that
12 is inherently suspicious, to be sending \$8 million to fill a
13 hole in the company's books, and that by itself should put you
14 on notice that something wrong has happened, and yet they're
15 going to argue that that shows nothing. That doesn't rely on
16 the credibility of Smyth or Campion or anyone else.

17 Look, maybe what's best is for us to see how they
18 close and what arguments they make to the jury based on the
19 evidence, and then we can reassess from there.

20 THE COURT: Just give me a minute.

21 I believe that my understanding of the law is correct,
22 which is that a conscious avoidance charge is appropriate when
23 "the evidence would permit a rational juror to conclude beyond
24 a reasonable doubt that the defendant was aware of the high
25 probability of the fact in dispute and consciously avoided

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1 confirming that fact," citing United States v. Cuti, 720 F.3d
2 453, 463 (2d Cir. 2013).

3 The issue that's in dispute here is a very simple one.
4 It's undisputed that fraud was committed at KITDigital. The
5 only issue is whether that fraud was done at the direction and
6 with the knowledge of Mr. Tuzman.

7 MR. NAFTALIS: Your Honor, we'd direct you to Goffer
8 as well. I don't know if you have that in front of you.

9 THE COURT: I'm sorry?

10 MR. NAFTALIS: U.S. v. Goffer.

11 THE COURT: I don't have that in front of me.

12 MR. NAFTALIS: Which is 720 F.3d 113, 127 and there
13 the circuit said, "Red flags about the legitimacy of a
14 transaction can be used to show both actual knowledge and
15 conscious avoidance." And U.S. v. Svoboda.

16 THE COURT: Yes, I'm familiar with that case.

17 I feel that this case falls in the bucket of what is
18 described in Cuti, and this is what the Second Circuit said in
19 Cuti:

20 "District courts should pay heed, however, to
21 circumstances in which a conscious avoidance charge may be
22 inappropriate."

23 I'm paying heed.

24 "This is so when the only evidence that alerts the
25 defendant to the high probability of the criminal activity is

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1 direct evidence of the illegality such that the question for
2 the jury is whether the defendant had either actual knowledge
3 or no knowledge at all of the facts in question."

4 That's from Cuti also, 720 F.3d 463.

5 I believe that this case is that case. I believe that
6 there has been direct evidence of Mr. Tuzman's involvement,
7 knowledge and intent to commit the fraud. It's not a case
8 where certain suspicious things were brought to his attention
9 or would have come to his attention and he didn't investigate
10 it or closed his eyes to it. The record here is that he was an
11 integral player, according to the government, in the fraud,
12 that it was done at his direction. There was testimony about
13 that from multiple witnesses, and I don't see that a conscious
14 avoidance charge is appropriate on the evidentiary record.

15 If you want to cite other cases to me, you're welcome
16 to do so. I'm happy to look at them, but I thought about the
17 issue when I was working on the charge, and I rejected the
18 notion that a conscious avoidance charge was appropriate. It
19 adds a significant layer of complexity to the charge, and there
20 has to be an evidentiary record to support it, or as the Second
21 Circuit says, there has to be evidence that would permit a
22 rational juror to conclude beyond a reasonable doubt that
23 Mr. Tuzman was aware of a high probability of the fraud and
24 consciously avoided confirming it.

25 The only way they could reach that conclusion is by

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1 flatly rejecting the testimony of the cooperators that he was
2 intimately involved in the fraud, and at that point, I think
3 the government's whole case falls apart.

4 MR. WILLIAMS: Your Honor, we actually disagree quite
5 strongly. We think that the documents in the case, we think we
6 can stand up before the jury and say you could disregard the
7 cooperator testimony; there are documents in the case that
8 establish his guilt. I mean, after all, we charged this case
9 without a single cooperating witness on the accounting-fraud
10 side. We charged it as a document case, and so we feel quite
11 strongly about our documents and the documents on their face
12 offer circumstantial proof of his knowledge. But he can argue
13 that the documents are not clear or he didn't read them that
14 way, the same way that the government does.

15 THE COURT: There isn't any evidence. Again, there's
16 been no evidence about how he read the documents. None. There
17 just isn't any evidence on that.

18 Will there be argument on that? Yes, but I don't
19 think that converts it. I can't focus on what arguments the
20 lawyers are going to make. The Second Circuit tells me to look
21 at the evidence. The evidence to me is one of direct
22 knowledge. That's what the evidence is.

23 MR. WILLIAMS: We'll go back again and look at the
24 law. I think we have been laboring under the impression that
25 when a defense is raised, so based on the evidence in the

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1 record, if the defense is raised that he didn't know because
2 these things weren't clear, the conscious avoidance charge can
3 then be used. But it sounds like, and we'll again go back and
4 look at the law, that the Court is saying that without evidence
5 in the record that the defendant wasn't aware of criminality,
6 despite there being red flags, then no charge is warranted.

7 Now that we understand what you're saying, we'll go
8 back and look at the cases, and if there's anything further we
9 want to submit on it, we will do that.

10 THE COURT: The example that Cuti cites, and you've
11 already alluded to it, is that there's evidence that a
12 defendant attended a meeting, that he wasn't paying attention
13 to what was going on, or the defendant signed documents but
14 offered evidence he didn't bother to read the documents. If we
15 had that kind of evidence here, I'd be sympathetic to your
16 position. I just don't see that evidence. Without that
17 evidence, I don't know what the defense lawyers are going to
18 argue, but it wouldn't surprise me if they argue that the
19 emails aren't as clear as you're going to argue they are. It
20 wouldn't shock me if they made that kind of argument, but I
21 don't think that our expectations of what they might argue
22 changes whether there's an evidentiary foundation for it or
23 not, and I don't see an evidentiary foundation.

24 To put it another way, I don't see a basis on which a
25 rational juror could find that he closed his eyes to the high

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1 probability of the fact that fraud was going on, that
2 round-tripping fraud was going on at KITDigital. But if you
3 have other cases you want to show me, I'm happy to look at
4 them, or proof in the record that you think would support this
5 closing his eyes argument, I'm happy to consider it.

6 MR. WILLIAMS: We'll go back and look.

7 THE COURT: But it has to be consciously avoiding.
8 It's not just "I was really busy; I was flying around the
9 world; I had a lot going on; I do M&As.

10 It's got to be more than that, consciously avoiding.

11 MR. WILLIAMS: Right.

12 THE COURT: It can't be just "I'm busy."

13 MR. WILLIAMS: Totally. We agree, and I think that
14 the thing that leaps to mind is the number of questions that
15 Mr. McRae asked witnesses like, This email doesn't say the
16 words "round trip" on it, right? That, I think, is an example
17 it's not clear.

18 Look, we hear you. I think you understand what we're
19 saying, and we understand that it's not going to be in the
20 charge as drafted. If there's anything else that we think
21 would be helpful, we'll submit it.

22 THE COURT: Thank you.

23 MR. WEITZMAN: Your Honor, just a few points. The
24 first is --

25 THE COURT: Just as a placeholder, because I don't

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1 want to forget, verdict sheet, but go ahead.

2 MR. WEITZMAN: On that placeholder, we have no
3 objection to the government's proposed verdict sheet.

4 THE COURT: You had submitted something which broke
5 down Count Six in a bunch of ways. You're not interested in
6 that; you just want a general verdict?

7 Do you want something different, Mr. Jackson?

8 MR. JACKSON: Oh, I want a general verdict sheet. I
9 thought that Mr. Isaza Tuzman was joining my application
10 yesterday that not guilty precede guilty.

11 THE COURT: That's right.

12 MR. WEITZMAN: We are joining that application, but we
13 want a general verdict.

14 MR. NAFTALIS: Your Honor, the order of guilty versus
15 not guilty doesn't matter to us.

16 THE COURT: I'm going to have guilty and not guilty.
17 It will be a general verdict sheet.

18 MR. JACKSON: Sorry, your Honor?

19 THE COURT: I am rejecting your suggestion.

20 MR. JACKSON: Thank you, Judge.

21 THE COURT: It will be guilty and not guilty.

22 MR. WEITZMAN: Second, does your Honor have a practice
23 with respect to quoting from the jury instructions during
24 summations?

25 THE COURT: It makes me very nervous, because

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1 invariably, questions of fairness and completeness come up. I
2 think it's important lawyers tailor their arguments to the
3 charge, and I have great sympathy for that, but I have to make
4 sure they don't in any way mischaracterize what my instructions
5 are going to be or mislead the jury about what my instructions
6 are going to be.

7 I wouldn't have a problem with "You're going to be
8 asked to determine whether -- blah, blah, blah."

9 MR. WEITZMAN: Right, or identify as an element of
10 this offense, you'll have to find.

11 THE COURT: Or, You're going to be asked to determine
12 whether -- pick the element --

13 MR. WEITZMAN: Right.

14 THE COURT: -- was proven beyond a reasonable doubt
15 here.

16 MR. WEITZMAN: OK.

17 MR. WILLIAMS: To be clear, that doesn't mean they
18 then get to define the element when telling the jury what the
19 element is, that they're going to have to --

20 THE COURT: See, when you start quoting, it makes me
21 nervous. This is a complex charge, and if you start quoting
22 from it, you're not going to want to quote all of it, and then
23 we're going to have these issues about whether the jury's been
24 misled about what's really in there.

25 I understand you want to tailor your argument. Is it

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1 Mr. McRae that's going to be doing it?

2 MR. WEITZMAN: Yes, your Honor.

3 THE COURT: I understand that Mr. McRae is going to
4 want to tailor his argument to what is in the charge, and what
5 I'd ask you to do, if you could, is please try not to quote the
6 charge, but rather, you can direct the jury's attention to
7 issues that are going to come up or things that they're going
8 to have to determine. That's totally fine, but representations
9 about what I'm going to tell them make me nervous because often
10 there is an issue about completeness.

11 MR. WEITZMAN: Understood, your Honor.

12 The second thing is we've been trying to figure out,
13 as your Honor's aware, how the case is given to the jury before
14 the close of Friday.

15 THE COURT: Yes.

16 MR. WEITZMAN: I wanted to throw out a suggestion. I
17 don't know if your Honor's ever done it, but your Honor did say
18 today that you will not require Mr. McRae to start his
19 summation, let's say, at 1 p.m. and talk for 20 minutes, but
20 the rules permit reading the instructions at any point in time.
21 What I was noticing is that the general instructions are about
22 20 pages. It seems to me if the timing works out, it could be
23 that you can start the general instructions right after the
24 prosecution's summation, right before the prosecution's
25 summation, so that they get two hours right up until 1:30, just

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1 some way to squeeze more in without wasting the jury's time and
2 make sure that the instructions are given before the holiday
3 period.

4 THE COURT: Part of it has to do with whether we're
5 going to be able to sit at all next week.

6 MR. WEITZMAN: I understand.

7 THE COURT: For example, if the answer comes back we
8 can't sit next week, I'd be very reluctant to give them legal
9 instructions and then have nine days go by before they start
10 deliberating, so that's part of the equation.

11 MR. WEITZMAN: Understood, your Honor.

12 MR. JACKSON: I will say, your Honor, to the extent
13 that I think we have the potential, and I think everyone's
14 probably in agreement on this. To the extent we have the
15 potential to start any deliberations, I do think it would be
16 helpful, and I'm certainly going to be focused on using my time
17 as efficiently as possible in order to hopefully help that
18 happen, because I do think that even if the jurors get a
19 limited amount of time, their ability to begin deliberations
20 when the summations are fresh in their minds and the trial's
21 fresh in their minds will, regardless of whether or not they
22 have to come back, I think, will give the jury deliberations
23 some momentum, so if there's a limited amount of time, I think
24 we would request the jury be allowed to start for the limited
25 amount of time to at least begin to process how they're going

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1 to deal with things.

2 THE COURT: Nothing would make me happier, but so far,
3 their unwillingness to stay later is going to be a problem.
4 And of course, I'm just trying to hold this together, and I
5 know everybody wants it held together, but I was hoping for
6 more flexibility on the 5:00 than I got today. We're still
7 going to explore with them whether even if 5:00 doesn't work,
8 does 4:30 work? And so I'm still hoping for some movement.

9 MR. WILLIAMS: Just so the record's clear, I don't
10 think the government would be -- we wouldn't consent to the
11 jury charge being broken up.

12 THE COURT: Yes. I don't think that's a good idea.

13 I will say there are judges, and this is, I think,
14 common in other districts, where the charge is given before the
15 summations. That's actually done. It's not done here, I don't
16 think, although I think Judge Engelmayer's done it.

17 MR. JACKSON: This is actually a pet issue of mine,
18 your Honor.

19 THE COURT: I'm sorry?

20 MR. JACKSON: This is actually a pet issue of mine.
21 I've submitted a letter on this a few times. I saw it first,
22 it's common in the District of D.C., and I saw it there and I
23 submitted a letter in the Madoff case explaining some of the
24 rationale and the science behind it. I do think that there can
25 be cases where it's appropriate and helpful.

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1 I will say here I have a little bit of a concern that
2 because of the complexity of the evidence, I think it will be
3 more helpful if the jurors have heard the generalized arguments
4 and then are able to inject that into the charge. But I could
5 see it either way. Certainly, in the Madoff case,
6 interestingly, Judge Swain agreed to adopt the proposal to give
7 the charge first, but then she decided to give the charge
8 before and after.

9 THE COURT: She gave it twice?

10 MR. JACKSON: She did. She ended up giving it twice.
11 To be fair, it was a very lengthy set of summations that went
12 on for almost two weeks, but we ended up having two charges,
13 and so I hope we don't have that here.

14 THE COURT: All right.

15 MR. WEITZMAN: The final thing is, and I'm not
16 reopening our case, I neglected to push on this issue, your
17 Honor, which is the issue of the flash drives. Your Honor will
18 recall we made a Touhy request. We requested a stipulation.
19 The government put in a letter in response.

20 In the letter, as they also said orally prior to the
21 letter, days prior to the letter, they represented that they
22 would talk to Mr. Smyth to find out if any of the 12 flash
23 drives were Mr. Tuzman's flash drives. I've spoken to
24 Mr. Williams. He says that he still hasn't spoken to Mr. Smyth
25 about that issue. I'm not sure he's inclined to. I think that

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1 it's part of their Giglio obligations. Whether we've rested or
2 not, we should know the answer to that and then we can decide
3 how to proceed.

4 THE COURT: Yes, I did think you were going to talk to
5 Smyth. I'm operating on the assumption that none of those
6 flash drives were -- they didn't include the one that he said
7 Tuzman gave him.

8 MR. WILLIAMS: And that's my understanding as well.
9 That's why I originally communicated that to Mr. Weitzman and
10 the Court. I think what I had said was that if we were going
11 to enter into a stipulation, the government would have to
12 confirm that the stipulation was accurate, because that's our
13 obligation, and we never did that because no stipulation was
14 entered into.

15 This came up, I went to Mr. Weitzman and said that I
16 wanted Mr. Smyth to return home to Australia, to be home with
17 his family for Christmas, and he said, Well, what about that
18 stipulation? And frankly, at this point, the case is closed.
19 We're not reopening for the government's Exhibit 610. We're
20 not inclined to enter into any additional stipulations on
21 Smyth's testimony. We're done, so we at this point don't feel
22 that we have the need to interview Smyth again for a
23 stipulation that we're not going to enter into. And we'll
24 leave it at that.

25 MR. WEITZMAN: I hear Mr. Williams. I hear what he's

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1 saying. I just think that he twice informed us that he was
2 going to get to the bottom of it, and we'd still like to get to
3 the bottom of it, for the record.

4 THE COURT: All right. It could have been raised and
5 if it had been raised, I would have addressed it, but I think
6 we're beyond that now.

7 Other issues?

8 MR. JACKSON: I don't think this is a real issue, your
9 Honor. I think it's correct that we're all in agreement that
10 the order of summations is going to be Mr. McRae after the
11 government and then me and then rebuttal.

12 THE COURT: I will make a general comment, which is I
13 think there was concern expressed at some point long ago that
14 the defendants were going to be throwing mud on each other, and
15 that's not what's happened in the case.

16 MR. WEITZMAN: That's correct, your Honor. And I
17 don't think that that's really the reason we were discussing
18 today which summation goes first. It came up because the delay
19 in summations is not at all my client's fault, and we felt at
20 the time that this is a bit prejudicial to our summation as a
21 result of this issue in the rebuttal case, and so fairness
22 would permit us to go second.

23 I think that Mr. Jackson and I have discussed it, and
24 assuming we can get an hour in tomorrow, an hour-fifteen in
25 tomorrow, I think we're comfortable proceeding first, your

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1 Honor.

2 THE COURT: All right. I'm going to do everything I
3 can to make sure that that happens.

4 MR. WEITZMAN: Thank you, your Honor.

5 THE COURT: Anything else?

6 MR. WILLIAMS: If we're all done, I have one personal
7 matter that I'd like to bring up off the record.

8 THE COURT: Sure.

9 (Discussion off the record)

10 MR. JACKSON: Thank you very much, your Honor.

11 MR. WILLIAMS: Thank you, your Honor.

12 MR. WEITZMAN: Thank you, your Honor.

13 THE COURT: Thank you, all.

14 (Adjourned to December 21, 2017, at 9:30 a.m.)
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GOVERNMENT EXHIBITS

Exhibit No. Received

35846542

346566

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3579A6571

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